

CASES DETERMINED
BY THE
SUPREME COURT
OF
THE STATE OF MISSOURI
AT THE
OCTOBER TERM, 1885.

THE STATE V. WILSON, *Appellant*.

1. **Criminal Practice :** INSTRUCTIONS. It is the duty of the court to instruct the jury with reference to the evidence in the case and where the evidence in a criminal trial all tends to prove one offence, instructions should not be given as to a different one.
2. ———: ———. The application of the above rule by the trial court in refusing an instruction for murder in the second degree on the trial of one on an indictment for murder in the first degree approved.

Appeal from Lafayette Criminal Court.—HON. JOHN
E. RYLAND, Judge.

AFFIRMED.

A. J. Hall, William Young and R. A. Hicklin
for appellant.

The court committed error in refusing to give an instruction on murder in the second degree. *State v. Banks*, 73 Mo. 592; *State v. Wilson*, 85 Mo. 134.

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B. G. Boone, Attorney General, for the state.

The evidence did not authorize an instruction on murder in the second degree. In reversing the case before, the court did not hold that the trial court had erred in failing to give an instruction for a lower grade of homicide than charged in the indictment, but that "the instructions given recognized and allowed a finding in a lower degree than murder in the first degree, but failed to define the lower grade of the crime."

John S. Blackwell also for the state.

(1) There was no evidence authorizing an instruction to be given in this case for murder in second degree, and it is not error to refuse to give an instruction for murder in the second degree where the evidence does not show the commission of that grade of offence. *State v. Collins*, 81 Mo. 652. (2) Instructions should be based on evidence, and if the evidence made out a case of murder in the first degree, on the first trial of this case, as declared by this court, and if the evidence be the same or stronger now than on the first trial, then an instruction for murder in the second degree, or for any less offence was improper. *State v. Little*, 67 Mo. 624; *State v. Bailey*, 57 Mo. 131; *State v. Harris*, 59 Mo. 550. (3) Where the evidence shows that the offence was either murder of the first or second degree, it is not error to refuse instructions as to manslaughter. Then it must and does follow, in reasoning from the same legal principles and authorities, that where the evidence plainly shows (as it does in this case, and as has twice been found by the trial court, and once found and emphatically declared by this court) that the offence was murder of the first degree, it was not error to refuse an instruction for murder in the second degree. *State v. Snell*, 78 Mo. 240; *State v. Kilgore*, 70 Mo. 546; *State v. Starr*,

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38 Mo. 270; *State v. Schoenwald*, 31 Mo. 147; *State v. Jones*, 79 Mo. 441.

NORTON, J.—The defendant was tried at the October term, 1885, of the circuit court of Lafayette county and convicted of murder in the first degree for killing one Jennie Stanford, from which he has appealed. This cause was before us at our last April term on a like appeal from a like judgment of conviction, and was reversed upon the ground that the court gave an instruction recognizing the right of the jury to find defendant guilty of some grade of homicide below murder in the first degree. There was nothing said in the opinion as to the grade of homicide below murder in the first degree to which the evidence might apply; but the opinion contains the following language: "The crime of which defendant stands convicted, if testimony to that effect from all the witnesses except defendant be taken as true, and the nature, number and direction of the gunshot wounds be considered, it was an atrociously brutal murder, without palliation or excuse. The testimony of the defendant, in some particulars, tended to show circumstances extenuating the offence; but when his whole testimony is examined, no possible doubt can arise as to the existence of his guilt in the degree affirmed by the verdict of the jury." *State v. Wilson*, 85 Mo. 134. Upon the cause being remanded and coming up for trial, the criminal court eliminated and did not give the instructions condemned by this court in its opinion, but only gave instructions relating to the crime of murder in the first degree, and refused to instruct the jury as to murder in the second degree, and the refusal of the court to give this instruction is the only ground of error relied upon by counsel to reverse the judgment.

The evidence upon the second trial is substantially the same as that given on the first trial, except on the second trial the case of the state was strengthened

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by the evidence of George Bullard, who was not examined as a witness on the first trial and who testified that on the evening before the killing, or at least within two or three days before the occurrence he heard defendant say: "Jennie, the damned bitch, had gone back on him; that he had one hundred and fifty dollars and was going to leave the county and if the damned bitch didn't behave herself he would shoot her." With the opinion of this court before the trial judge as a guide for him in the trial, though reversed because of an instruction being given in the former trial, recognizing the right of the jury to find the defendant guilty of some other grade of homicide than murder in the first degree, without *stating the grade of homicide to which this evidence applied*, inasmuch as this court in the opinion reversing the judgment in the former trial did not intimate or suggest any grade of homicide below murder in the first degree which the evidence tended to establish, and inasmuch as the trial judge had to look to the opinion for guidance in conducting the trial, and looking at it saw that this court, after considering the whole evidence of defendant, declared that no possible doubt could arise as to the existence of defendant's guilt in the degree affirmed by the jury, what else could the trial judge do but to confine the attention of the jury in his instructions to the crime of murder in the first degree, that being the crime of which we said from the whole of his evidence there could be no possible doubt of his guilt? Suppose the court had ignored this declaration, and given an instruction for murder in the second degree, and the defendant had been convicted and appealed to this court, could he not have relied confidently on the case of the *State v. Ross & Phillips*, 24 Mo. 489, where an instruction was given for murder in the second degree, and Ross was convicted of murder in that degree, from which he appealed? Scott, Judge, said that it was

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no case for murder in the second degree; "For there can be no doubt, unless we stultify ourselves and refuse to permit our judgments to be influenced by considerations which govern all the rest of mankind that Philips intended to kill Watson. * * * It is true the jury alone could determine the fact of intention. * * * But in matters of this kind the court should not by its instructions invite a doubt when nothing is so unreasonable as to suppose that any can exist. As the case was not one for an instruction on the law concerning murder in the second degree, and as defendants were tried for murder in the first degree it may be thought defendants were not prejudiced by such instruction. This idea cannot be sustained. We cannot say whether defendant should have been found guilty of murder as charged or not. The jury was improperly led away from that issue by an instruction which induced their conviction of the crime of murder in the second degree. They complain of that conviction and have a right to have the judgment reversed if it has been obtained by undue means."

The undisputed evidence in the case shows that the night before deceased was shot and killed, she and defendant had a quarrel in which threats were made by the defendant against the deceased, and that two or three days before the tragedy defendant in speaking of deceased said he had one hundred and fifty dollars and was going to leave the country, and if the damned bitch didn't behave herself he would shoot her. The undisputed evidence shows that defendant, who was head cook in the Virginia hotel, on the morning deceased was killed, which occurred about seven or eight o'clock, before breakfast was finished, told the assistant cook that she would have to get dinner, that he was going to leave; he bid all the help about the house goodbye, saying he was going to the post office, but started off

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west in an opposite or different direction, and a short time after deceased was shot, defendant returned to the hotel, saying he had shot Jennie and if she was not dead she would die. The undisputed evidence also shows that he went directly from the hotel, after bidding the help goodbye, to the house where deceased was staying, enquired if she was there and on being told that she was in bed asleep in the little room adjoining the large room, he went into the room where she was and closing the door behind him ordered her to get up, and on her refusal he said: "God d—n you; I have got it in for you and will do you up," that a pistol shot was then heard and deceased ran out in her night clothes through the large room, on to the porch and out to the gate, hallooing and screaming; that defendant pursued her and fired two shots at her as she ran; that when the last shot was fired, deceased immediately fell to the ground, just outside the gate, and died, where she fell, in a few moments, without speaking. The physician who examined her body testified there were three gun shot wounds on her person, two of which were necessarily fatal, one of them being in the back. The above facts were established by several witnesses. Defendant, who was examined on his own behalf, did not dispute the fact that he pursued the deceased and shot at her twice while she was fleeing from him in her night dress. His account of what occurred after he entered the room where deceased was in bed is as follows:

"I went into the room. Jennie was in bed. I asked her to get up and go to my room with me; she said she would not and sat up on the edge of the bed with her feet on the floor. She had eighty dollars of mine which I had given her to keep for me; we were engaged. I said, 'I suppose our engagement is all over with;' she said 'yes, I have been playing you for your bottom dollar and I have got it and have no further use for you.' She refused to give me my money and said she would

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burn it up first. I said, 'yes, you threatened my life last night, did you mean it?' She said 'yes, I meant it and I will do it now;' she ran her hand under the pillow pulled out a pistol and started towards me. I sprang at her, wrenched the pistol from her hand and it went off. I got the pistol from her, she stooped down as if reaching for something and I fired. I don't know whether I fired again or not. When I came out and saw Jennie lying there I knew what I had done, gave the pistol a toss, came up town and gave myself up." On his cross-examination he said: "I do not know what she was stooping for when I shot her; don't know why I threw the pistol away; don't remember firing the third shot. Can't tell why. Can't remember what was done up to the time of shooting the second shot." According to defendant's own evidence he had disarmed his victim, and shot her when she was in a stooping position and powerless to harm him. He does not state that there was anything within her reach with which if she had even secured it, she could have hurt him. Besides this the uncontradicted evidence is that deceased fled from him, that he pursued her with a deadly aim, shot her mortally in the back as she got to the gate, twenty-five feet from him, as if determined that she should not escape the fate which he said two or three days before should be hers.

The case is analogous to the case of *State v. Jones*, 79 Mo. 441, at least so far as the evidence of defendant given in his own behalf is concerned, and it was there held that the court properly refused an instruction for murder in the second degree. In view of what is said in the case of the case of the *State v. Starr*, 38 Mo. 272: "That it is the duty of the court to instruct the jury with reference to the testimony in the case, and when the evidence all tends to prove one offence, it is wrong to mislead the jury by giving instructions in relation to a different one," we cannot see how the court could have given an instruction for murder in the second degree. Two juries

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have passed upon the guilt of defendant, the record shows that he was fairly tried and the verdict of the jury is fully sustained by the evidence, and perceiving no cause for interfering with the judgment, it is hereby affirmed, in which all concur.

SIEMERS *et al.*, Appellants, v. SCHRADER *et al.*

1. **Deed of Trust : SALE : TITLE.** A sale under a deed of trust where it has not been advertised for the time required by such deed, passes no title.
2. **Mortgagee : TRUSTEE : EJECTMENT.** A mortgagee, in the absence of an agreement to the contrary, may maintain ejectment for the mortgaged premises, after breach of the conditions, and so, it seems, may also a trustee in a deed of trust.
3. **Ejectment : CESTUI QUE TRUST.** The *cestui que trust* in a deed of trust to secure the payment of a debt, cannot maintain ejectment after condition broken.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Thos. A. Russell and *E. P. Johnson* for appellants.

(1) The acceptance of the contract by Virginia Brault from Siemers, she being in possession, estopped her and those claiming under her, from disputing Siemers' title. *Jackson v. Ayres*, 14 Johns. 224; *Tyler on Ejec.* 166; *Pratt v. Canfield*, 67 Mo. 53; *Walker v. Sedgwick*, 8 Cal. 403. (2) The introduction of the tax deed made under an assessment against Siemers in evidence estopped them from disputing his title after the

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tax sale. *Rumfelt v. O'Brien*, 57 Mo. 569; *Brown v. Brown*, 45 Mo. 412; *Pease v. Lawson*, 33 Mo. 35. (3) Siemers having purchased the premises at a sale under a deed of trust, although the sale might not have been regular, it transferred to him the note secured by the deed of trust, and he could maintain this action by virtue of such ownership, he being the real party interested. (4) He could maintain ejectment for the premises independently of the trustee. *Rogers v. Gosnell*, 51 Mo. 466; *McComas v. Ins. Co.*, 56 Mo. 573; 47 Mo. 582; 40 Mo. 184; 28 Mo. 358..

Pattison & Crane for respondents.

(1) The trustee's deed was a nullity; it appearing upon its face that the notice of sale had not been published for the requisite number of days. *German Bank v. Stumpf*, 73 Mo. 311; *Johnson v. Douglas*, *Ib.* 168. (2) The tax deed offered by respondents was properly admitted in evidence. Laws 1872, p. 130, sec. 222; *Spurlock v. Dougherty*, 81 Mo. 171; *Pillow v. Roberts*, 13 How. 472. (3) A claim of title which cannot be set up by a person while in possession, cannot be set up by another person who comes into possession under him. *Pratt v. Canfield*, 67 Mo. 53.

HENRY, C. J.—On December 18, 1868, Virginia Brault and H. K. Burch executed and delivered a deed of trust conveying the property in dispute to Barr's trustee, to secure a note for three hundred dollars, made by them to Barr. Afterwards said note became the property of plaintiff, who, in 1870, by an instrument in writing, agreed with Virginia Brault to sell, without any unnecessary delay, the real estate in controversy, under said deed of trust, and purchase it, and to convey it to her, on payment to him of money named in said agreement as having been paid by him for her and Burch, and

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further agreeing that he would not convey or dispose of the property to any one else, within two years from the date of the instrument. This was signed by Siemers alone, but was delivered by him to Virginia Brault. Subsequently, in 1872, the property was advertised for sale under said deed of trust, and Siemers purchased it and received a deed therefor from the trustee, but the sale was not advertised for such a length of time as the trust deed required, and he acquired no title to the property by that deed.

After that sale he conveyed an undivided half of his interest in the premises to his co-plaintiff, Johnson, and they instituted this suit in ejectment to recover the possession of the premises against Schrader, a tenant of Chambers, who, on his own application, was made a party defendant. Chambers purchased the property at a sale for taxes in 1882, and in 1876, Virginia Brault and Burch, and Nancy Bonner, to whom said agreement between Siemers and Virginia Brault had been assigned by the latter, conveyed the property to Chambers by quit-claim deed. Defendant had a judgment in the circuit court which, on appeal to the court of appeals, was affirmed, and plaintiffs have prosecuted an appeal to this court.

Siemers acquired no title by the purchase at the trustee's sale. The requisite notice of the sale was not given, and it is scarcely necessary to cite authorities for the proposition, that a conveyance under such a sale passes no title. By his written agreement he stipulated that he would acquire the title by a sale under the deed of trust, but his attempt to do so was abortive, and nothing has since occurred, so far as is disclosed by this record, to invest him with the legal title. A mortgagee, in the absence of an agreement to the contrary, may maintain ejectment for the possession of the mortgaged premises, after breach of the condition. Jones on Mortgage, sec. 702. But plaintiffs, as owners of the debt secured by

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the deed of trust, have only the same equitable interest in the trust property which the payee of the note had. The title was not conveyed to the holder of the note, but to a trustee ; and while a deed of trust to secure a debt is, in legal effect, a mortgage, yet it has not all the legal incidents of a mortgage. There is a marked distinction between them in some respects. In the case of a mortgage, the beneficiary is also the grantee in the deed, having in himself the legal title, whereas, in a deed of trust, the beneficiary is not, but another is, the grantee. The beneficiary has but an equitable title. In some cases the beneficiary in a deed of trust may recover possession, even from his trustee ; but those are cases in which the trustee holds solely for the use and benefit of the beneficiary, and no one else has any interest in the trust property.

But in a deed of trust to secure a debt, the grantor still has an interest in the property, and in the due and proper execution of the trust by the trustee who represents the interests of both parties. He has, in the first instance, a voice in the selection of the person to whom he will convey the property in trust. It has never yet been held in this state, in a case involving that precise question, that even the trustee in such a deed can maintain an action of ejectment to recover the premises. In the case of *Johnson v. Houston et al.*, 47 Mo. 227, the argument and remarks, in the opinion delivered by Judge Bliss, seem to recognize the right of the trustee to recover possession after breach of the condition ; and I cannot see why he may not, since the legal title is conveyed to him, as to the mortgagee in a mortgage. But no case in which the beneficiary in a deed of trust was held to have that right has been cited, nor have I been able to find one. He cannot, in any sense, be regarded as having the legal title. Another person, by the express terms of the deed, has the legal title, and it would be an anomaly if the beneficiary were permitted to main-

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tain an action of ejectment. The decisions in the cases of *State to use, etc., v. McKellop et al.*, 40 Mo. 184; *Winkelmaier v. Weaver*, 28 Mo. 358, and *The State to use of Peters v. Koch*, 47 Mo. 582, cited by appellants' counsel, were all controlled by a local act concerning the duties of sheriff and marshal of St. Louis county, authorizing any one *having an interest in the property* to set up a claim, and the court held that, under that statute, a beneficiary in a deed of trust of personal property, could make the claim. This view of the case renders it unnecessary to consider the questions relative to the tax deed, and the quit-claim deed, under which Chambers claims title. The judgment is affirmed. All concur.

HAGMAN, Appellant, v. SHAFFNER *et al.*

1. **Equity.** Where reformation and specific performance of deeds and contracts respecting the sale of lands will be decreed by a court of equity between the original parties thereto, similar relief will in general be given in suits between parties claiming under them.
2. **Sale of Land : PRIOR EQUITIES.** One purchasing land with knowledge of a prior contract as to it, on the part of the vendor, is chargeable with all the equities arising therefrom and affecting the land in the hands of the vendor, and in like manner where a third person claims under a vendee in such contract, he may, upon the payment of the purchase money, or its tender, compel the vendor, or his heirs, or a purchaser with notice, to complete the contract and convey the title.

Appeal from Henry Circuit Court.—HON. JAS. B
GANTT, Judge.

AFFIRMED.

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M. A. Fyke for appellant.

The appellant, for a reversal of this case, relies upon the testimony, which conclusively shows: (1) That John M. Shirley had sold, and intended to convey the land to Clayton, and by oversight the same was omitted from the deed. (2) That defendant, Shaffner, before obtaining quit-claim deeds from the Shirley heirs, had full notice of the intention of Shirley to convey the land to Clayton, and of the omission of the same from the deed. (3) That defendant, Shaffner, knew before he obtained his deeds that Clayton had conveyed the land to Dauwalter, and Dauwalter to plaintiff, and that plaintiff was in possession of the same. These facts appearing clearly, from the testimony, the plaintiff is entitled to a decree, as prayed in his petition.

Foster P. Wright for respondents.

(1) The petition contains no equity. (2) The evidence offered to show that the land in controversy was omitted from the deeds by mistake, is not of such a satisfactory character as to justify the interference of a court of equity. In such cases the evidence must be definite, clear and positive. *Forrester v. Scoville*, 51 Mo. 268; *Hendricks v. Wood*, 79 Mo. 590; *Judy v. Bush*, 81 Mo. 975. (3) Plaintiff bought with knowledge of the fact that Clayton never had the title, and he, therefore, cannot maintain his suit.

RAY, J.—This is a proceeding in equity, the nature and object of which is to set aside and hold for naught a deed to a certain ten acre tract of land, executed to the defendant, Isaac Shaffner, by the other defendants, who are the heirs of John Shirley, deceased, as well as the title of said heirs, and to vest the title thereto in plaintiff. Shirley was the owner of a large body of land in

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Henry and St. Clair counties, Missouri, and situated, as we infer, on and near the county line between said counties. There had been pending for some weeks some negotiations between him and Wm. A. Clayton, for the sale of said lands, and a trade was made during the last sickness of said Shirley, and on the day of his death, by which Shirley conveyed five hundred and twenty acres, seventy of which were located in St. Clair county, and the rest in Henry county, by his two several deeds, and Clayton executed at the same time his several notes for three thousand dollars, payable in four years, and turned over some personal property as part of the purchase price. The petition alleged that said Clayton had paid to said Shirley the full purchase price of said real estate. This, the separate answer of Shaffner denied. The land in dispute is ten acres of the Henry county land, and was wild and unimproved timber land * * * and was not conveyed by said deeds. Shirley intended and declared that the trade and deeds were to be null and void if he got well, but in the event of his death they were to stand and hold good. Shirley and Clayton being unable to agree upon the price, agreed upon two parties to appraise the same, who, in turn, called in the defendant, Shaffner, to act with them as a third appraiser in that behalf, and they valued the land in a lump at six dollars per acre. Plaintiff read in evidence a deed from said Clayton, dated January 26, 1877, conveying the land in dispute to Peter Dauwalter. At the time of said conveyance said Clayton learned, for the first time, through Blackford, who examined the title at that time, that the ten acre tract was not included in his deed from Shirley, and ninety dollars of the purchase money was left deposited with Blackford upon an agreement between him and Dauwalter, that it should not be paid until the title thereto was perfected. An agreement and receipt to that effect, signed by said Clayton and contemporaneous with the delivery of the deed, was read in evidence by plain-

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tiff, and bore an endorsement of assignment, dated _____, by Dauwalter, of his title and interest therein to the plaintiff, Hagman. Plaintiff also read in evidence a quit-claim deed, for a consideration of one dollar, from said Dauwalter to plaintiff, for the land in dispute, which contained a recital that the intention thereof was only to substitute plaintiff in the place of said Dauwalter in the said contract and conveyance between said Clayton and said Dauwalter.

The evidence is, we think, reasonably certain, indeed, clear, and beyond question, that the ten acre tract was intended to be conveyed, but was omitted, by mistake, from the Shirley deed of other lands to Clayton, and that Shaffner had notice and knowledge that the ten acre tract was so intended to be included in Shirley's deed of other lands to Clayton, as was charged in the petition. Said Shaffner was present when the trade was made and deeds delivered, and acted as one of the appraisers, appraising and including the ten acres with the rest of Shirley's land, and fixing a price therefor on all of it. Some four or five witnesses, also present, say positively that Shirley said that he was selling all his lands to Clayton, except one piece in St. Clair county. And in the evidence of Shaffner there are but two statements in this behalf, one of which is that he does not know why the ten acre tract in dispute was left out of the deed, and the other is that the first he knew it was not in the deed to Clayton, was when Blackford told him two or three years after Shirley's death. And it is plain, we think, that he had always supposed that it was conveyed by Shirley to Clayton, and was surprised to find out several years after that it was not. The defendant, Shaffner, became the administrator of the estate of said Shirley. He learned, through Dauwalter, of the trade, and terms thereof, between him and Clayton, and of the result of the examination made by Blackford as to the condition of the title, and then learned, for the first time, that the

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ten acres was not in the Shirley deed. Shaffner wrote to one of the heirs (all of whom, it seems, were non-residents), who came out and went over the land with Shaffner, and sold his interest therein to Shaffner for five dollars, and four or five of the other heirs did the same. The interest of five or six of the seven heirs cost him thirty dollars or thirty-five dollars. The evidence also shows that when Shaffner bought, and before he paid anything for the land, he knew that Hagman, the plaintiff, was in possession of the land and claiming it. The evidence further shows, as charged in the separate answer of Shaffner, that Hagman, the plaintiff, knew before he purchased, that Clayton and Dauwalter neither had the legal title to the land in controversy, and that the *land* in dispute was not in the deed from Shirley to Clayton. And it further shows, as charged in the answer, that Clayton has never paid the notes given for the purchase of the land, and that judgment thereon had been obtained by Shaffner, as administrator of Shirley's estate, in the circuit court of St. Clair county, and remained unsatisfied, except the amount of five hundred dollars, which had been collected from said Clayton. Upon the hearing, the chancellor dismissed the bill for the want of equity, and the plaintiff appealed to this court.

It will be observed that the controversy and effort to reform the contract and deed, in respect to the sale of said lands, is not between the vendor and vendee, the original parties thereto. The plaintiff, Hagman, claims in virtue of an equitable right of Wm. Clayton, the original vendee, and derivable through one Dauwalter, to whom said Clayton conveyed. The defendant, Shaffner, claims the title through conveyances from the heirs of J. M. Shirley, who is the original vendor. In general, it may be said that where reformation and specific performance of deeds and contracts respecting the sale of lands will be decreed by a court of equity between the original parties, similar relief, will, in the absence of other intervening and controlling equities, be given in actions

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between parties claiming under them. The person purchasing lands, with knowledge of a prior contract and agreement on the part of the vendor, is chargeable with all the equities affecting the lands in the hands of the vendor, and in a like manner where a third party claims through and under the vendee in such a contract respecting the sale and conveyance of lands, he may, upon the payment of the purchase money, or tender thereof, compel the vendor or his heirs at law, or a purchaser with notice, to reform and complete the agreement and convey the title. As has been said, the vendor, as to the land, becomes in equity the trustee of the vendee, and the vendee, in his turn, becomes, in equity, a trustee for the vendor as to the purchase money. Story's Eq., 784. If this is so, it is clear, upon the evidence, that the plaintiff, Hagman, in this case, who bought from and took the place of said Dauwalter in his contract and purchase of the land from said Clayton, the original vendee, occupies no better or more meritorious position than said Clayton, and would be, we think, entitled to the relief sought in this action, upon terms no more favorable than would attend a similar action for similar relief brought on the part and in behalf of said Clayton, the original vendee. And defendant, Shaffner, who is a purchaser with notice of the equity of Clayton, and of the plaintiff claiming under said Clayton, occupies, on the other hand, the same position which would be held in respect to this transaction by the said Shirley, the original owner and vendor of the land. In any action instituted by said Clayton, the vendee, against said Shirley, or he being dead, against his heirs, to enforce his equitable right to a deed for the land omitted by mistake, what, we may ask, would be the equities as between them upon similar evidence to that in the record now before us? Shirley has, as would in that event appear, conveyed all the land which he agreed to convey except the ten acres, and said Clayton has not paid his notes given for the purchase, though they are long past due and a judgment recovered thereon amount-

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ing to some five or six thousand dollars is unsatisfied except in the sum of five hundred dollars collected thereon. Manifestly, a court of equity would not, and ought not, to grant the relief here asked to said Clayton and decree him the title to the ten acres, until he had executed and performed the contract on his part, by paying, or offering to pay, his notes given therefor. This is the mutual equity which the court would require to be done in the premises by the parties. Story's Eq., 737; *Delasus v. Poston*, 19 Mo. 425; *O'Fallon v. Kennerly*, 45 Mo. 124.

In this action the evidence is, that Clayton never paid, or offered to pay, the said notes, though long overdue, or to satisfy the judgment obtained thereon, and there is no payment or tender thereof of any part thereof to the amount of the agreed price of the ten acre tract, or otherwise on the part of the plaintiff at the trial, nor is there any offer to satisfy in part or *pro tanto* said judgment on part of plaintiff. Freeman on Judgments, sec. 516. In the land trades and purchases involved, the parties had no dealings directly between themselves. Neither of them has been induced to act or change his position in respect to said title by the other. They have both fully understood the situation before making their outlays, which are but little more than nominal, in their race for the land. And, generally, it requires less strength of proof on the part of the defendant to resist successfully any application for such relief than is necessary for the plaintiff to have in order to maintain his bill. In cases of this sort the practice of courts of equity is to leave the parties, such as these, where it finds them, and to withhold all such relief, unless the facts, equities and justice of the case clearly demand it.

Under the pleadings and evidence, no such demand exists, and we are of opinion that the chancellor manifestly did right in dismissing the bill for want of equity, and for that reason the judgment of the trial court is affirmed. All concur.

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BUCHAN V. BROADWELL *et al.*, *Plaintiffs in Error.*

1. **Practice : CHANGE OF VENUE.** On an application for a change of venue, it appeared that the same was sworn to by a nominal party to the suit ; that the prejudice of the inhabitants was alleged to be against him alone, and also that a number of counter affidavits were filed, but they were not preserved in the record ; *held*, that under these facts the Supreme Court could not say that error was committed in overruling the application.
2. **Special Tax Bill : PLEADING : EVIDENCE.** The petition in this case, which was a suit to enforce the collection of special tax bills, *held* good and objections to offers of evidence made at the trial properly overruled.
3. — : **CHARTER OF KANSAS CITY : CONSTITUTION.** Section 1, article 8, of the charter of the City of Kansas, which provides that "the common council on the petition of residents of Kansas City, who own a majority of the front feet on a street to be graded, may order the same to be graded at the expense of the property owners," is not a discrimination against non-resident owners and for that reason unconstitutional.
4. — : **JUDGMENT : INTEREST.** A judgment on special tax bills *held*, under the charter of Kansas City, to properly bear fifteen per cent. interest.

Appeal from Jackson Circuit Court.—HON. TURNER
A. GILL, Judge.

AFFIRMED.

Frank Titus for plaintiffs in error.

(1) Defendants' objection to the sufficiency of the petition should have been sustained. City ordinances, when relied on, should be pleaded. *State, etc., v. Oddle*, 42 Mo. 210 ; *Mooney v. Kennet*, 19 Mo. 555. (2) The evidence offered by defendants to prove that the charter and ordinances had not been complied with, and that a majority of property owners in front feet on the graded

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street, who were residents of the city, did not petition for the work, was improperly excluded. *Abbott v. Lindemower*, 42 Mo. 162; s. c., 46 Mo. 291; *Henderson v. Mayor, etc.*, 8 Md. 352; *Sharp v. Speer*, 4 Hill (N.Y.) 76; *Ewart v. Davis*, 76 Mo. 129. The defendant, Broadwell, should have been permitted to testify. *Quale v. Fisher*, 63 Mo. 325; *Buck v. Ashbrook*, 51 Mo. 539. (3) Discrimination against property owners non-resident in the city (sec. 1, art. 8, of Charter) is unconstitutional in the exercise of the taxing power. 2 Dill. on Mun. Corp. (2 Ed.) secs. 592, 631; Cooley on Cons. Lim. (2 Ed.) 626, 389; *Att'y Gen'l v. Winnebago, etc.*, 11 Wis. 35; *Weeks v. City of Milwaukee*, 10 Wis. 242, 258, 269; *O'Kane v. Treat*, 25 Ill. 557; *Lin Sing v. Washburn*, 20 Cal. 534; *Strauder v. West Virginia*, 100 U. S. 303; *Ward v. Maryland*, 12 Wall. 419; The Railroad Tax Cases, 13 Federal Reporter, 722; *County of San Mateo v. S. P. Ry. Co.*, 13 Fed. Rep. 145; *County of Santa Clara v. S. P. Ry. Co.*, 18 Federal Reporter, 385 and note; *Craw v. Village of Tolono*, 96 Ill. 255. (4) Where the work, the payment of which is sought to be obtained by special assessment, is not a work of local benefit, but of general public benefit to the city at large only, such special assessments are not enforceable, yet the trial court denied this to be the law. *State ex rel. Chouteau v. Leffingwell*, 54 Mo. 473; *Hammitt v. Philadelphia*, 65 Pa. St. 146; *Stuart v. Palmer*, 74 N. Y. 183; Cooley's Const. Lim., 615, 633 (4 Ed.); Cooley on Taxation (1 Ed.) 459; 2 Desty on Taxation, 1237. (5) The change of venue should have been granted. It was in due form and complied with the law. Revised Statutes, section 3729. The application was sworn to by defendant, M. M. Broadwell, the husband of his co-defendant, on behalf of both. This was sufficient. *Walcott v. Walcott*, 32 Wis. 63; *Jones v. C., R. I. & P. Ry.*, 36 Iowa, 68; *Brady v. Otis*, 40 Iowa, 97; *Mix v. Kepner*, 81 Mo. 93. (6) The judgment bears fifteen per cent. interest, which

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is illegal. *Breuster v. Wakefield*, 22 How. 157; *Bumheisel v. Feriman*, 22 Wall. 176; *Holden v. Trust Co.*, 100 U. S. 72; *Gaillard v. Ball*, 1 Nott. & McCord, 67; *Ohio v. Frank*, 13 Cent. L. J. 55; *Ludwick v. Hentzger*, 5 Watts. & S. 51; *O'Brien v. Young*, 95 N. Y. 428. (7) That tax bill is merged in judgment and should only bear legal rate of interest. *Jameson v. Barber*, 56 Wis. 630; *Newton v. Kennerly*, 31 Ark. 626; *Robinson v. Kerney*, 2 Kan. 184; *Briggs v. Winsmith*, 30 Am. Rep. 49; *Lash v. Lambert*, 15 Minn. 416. And when tax bills are contested interest thereon is only chargeable from date of ascertainment of sum legally due. *St. Joseph Hospital*, 60 N. Y. 353.

C. J. Bower and Karnes & Ess for defendant in error.

(1) Local assessment for improvements is not considered as a burden, but as an equivalent, or compensation for the enhanced value which the property derives from the improvement. *Lockwood v. St. Louis*, 24 Mo. 20; *Sheehan v. The Good, etc.*, 50 Mo. 155; *City, etc., v. Allen*, 53 Mo. 54. (2) The fact that work or materials, other than that allowable under the contract, was charged for in the bill will not invalidate it, but the amount improperly charged should be deducted. *Neenan v. Smith*, 60 Mo. 232; *First Nat. Bank v. Arnoldia*, 63 Mo. 229; *First Nat. Bank v. Nelson*, 64 Mo. 418. (3) The judgment properly bore fifteen per cent. interest. Charter, section 4, article 8; *City etc., v. Allen*, 53 Mo. 44. (4) The application for a change of venue was properly overruled, as it was sworn to by M. M. Broadwell alone, who was a nominal party. *Lewis v. Dille*, 17 Mo. 64; *Huthsing v. Maus*, 36 Mo. 101; *Norvell v. Porter*, 62 Mo. 309. Where the prejudice alleged is against the inhabitants of the county, it would seem that the court ought to be allowed to hear counter affidavits.

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Bank v. Ward, 11 Ohio, 128; *Boswell v. Flockheart*, 8 Leigh, 364; *State v. Mooney*, 10 Ia. 506; *Weeks v. State*, 31 Miss. 490. (5) The testimony sought to be elicited from M. M. Broadwell was not concerning matters in which he was the agent of his wife, and was, therefore, rightly excluded. *Haerle v. Krein*, 65 Mo. 202. (6) The petition was sufficient. Each count contained more than the charter requires. City Charter, art. 8, sec. 4. There was nothing requiring the ordinance to be pleaded. *City, etc., v. Hardy*, 35 Mo. 261; *City, etc., v. Newman*, 45 Mo. 138. (7) There was no error in the court refusing to allow defendants to introduce evidence tending to show that a majority of the resident property owners had not signed a petition for the work. City Charter, art. 8, sec. 8; *In re Kiernan*, 62 N. Y. 457; *People v. City, etc.*, 21 Barb. 656; *Burhyte v. Shepherd*, 35 N. Y. 238. (8) The legislature may constitutionally confer upon municipal corporations the power to improve streets at the expense of the adjoining proprietors. Dillon on M. C., (3 Ed.) sec. 752; *Palmyra v. Morton*, 25 Mo. 593; *Egyptian Doll Co. v. Harding*, 27 Mo. 495; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *Lockwood v. St. Louis*, 24 Mo. 21; *St. Louis v. Clemen*, 33 Mo. 467. (9) The certified tax bill is *prima facie* evidence of the validity of the bill, of the doing of the work, of the furnishing of the materials charged therefor, and of the liability of the property to the charge stated in the bill. City Charter, art. 8, sec. 4; *City, etc., v. Armstrong*, 38 Mo. 33.

NORTON, J.—This suit was instituted in the circuit court of Jackson county to enforce the collection of four special tax bills. On the trial plaintiff obtained judgment, from which defendant has prosecuted a writ of error to this court. A great number of errors have been assigned and we will only consider those which we deem to be material. It is objected that the court erred in overruling an application for change of venue based on

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the alleged prejudice of the inhabitants of Jackson county. It appears from the record that the affidavit attached to the application was sworn to by William Broadwell, who was a mere formal and nominal party, and the prejudice of the inhabitants was alleged to be against him alone, and it further appears that seven or eight counter affidavits to that of Broadwell were filed, but what they contained does not appear. Under these circumstances we cannot say that error was committed in overruling the application.

Objection was also made to the introduction of any evidence under the petition, because it did not state a cause of action and did not plead the ordinance which authorized the grading of the street, for the payment of which grading the tax bills were issued. This objection was properly overruled. It is provided by section four, article eight, of the city charter, that in suits on tax bills "it shall be sufficient for the plaintiff to plead the making and issuing of the tax bill sued on, giving the date and contents thereof, an assignment thereof in case of assignment, filing the same and allege that the party or parties made defendants own or claim to own the land charged, or some estate or interest therein, as the case may be." The averments in the petition meet all the requirements of this charter provision and more, by averring that the grading of the street was done by virtue of a certain ordinance, giving its date and number.

The defendants offered evidence tending to show that a majority of resident property owners, owning a majority of front feet on the street graded had not signed the petition for grading the street. This objection was properly overruled for the reason that it is provided by section 8, article 8, of the charter that "if the common council shall in the ordinance causing to be done the work petitioned for, find and declare that the work has been petitioned for and the petition published according to law, such finding and declaration

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shall be conclusive for all purposes and no special tax bill shall be affected by any defect in or objection to the petition."

The objection to the introduction of the tax bill was properly overruled. Section 4, article 8, of the charter provides that "such certified bill shall in any action thereon, be *prima facie* evidence of the validity of the bill, the doing of the work and of the furnishing of the materials therefor, and of the liability of the property to the charge stated in the bill." The assignment of the tax bills to plaintiff, as well as their execution by the city engineer, was shown. 33 Mo. 33; 35 Mo. 261; 37 Mo. 44. There is nothing in the constitutional objection made that non-resident property owners are discriminated against by section 1, article 8, of the charter, which provides that "the common council on the petition of residents of Kansas City, who own a majority of front feet on a street to be graded, may order the same to be graded at the expense of the property owners." When it is done the same rule of assessment applies to all the property whether owned by residents or non-residents. 2 Dill. on Mun. Corp., secs. 752, 802. The legislature in the exercise of its paramount control of the state could have authorized the council to have ordered the grading of streets at the expense of property owners without any petition. *Railroad Co. v. City of St. Louis*, 66 Mo. 228; *Farrar v. City of St. Louis*, 80 Mo. 379. In the case last cited, it is held in discussing the question of special assessments for street or local improvements, that the property is assessed with reference to the benefits derived from the improvement; it is a tax on the benefits rather than on the property. While the property of defendants, before the street in question was graded was valued at five hundred dollars, the evidence tended to show that after the grading of the street it was valued at \$3,000.

It is also insisted that the judgment was erroneous

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in that it bears fifteen per cent. interest. This point is not well taken. By section 4, article 8, of the charter, it is provided that "each tax bill shall bear interest from its issue at the rate of fifteen per cent. per annum if not paid within thirty days after the issue thereof." And when judgment is recovered on such tax bill it is provided that "the judgment shall bear interest at the same rate as the tax bill." Other objections of a like character to those we have considered are urged on our attention, but we omit notice of them farther than to say that they do not in any way affect the merits of the controversy, and as the judgment is for the right party on the whole record, it is hereby affirmed, with the concurrence of the other judges.

BANK OF COMMERCE V. HOEBER, *Appellant.*

1. **Composition Agreement : PREFERENCE : KNOWLEDGE OF ATTORNEY, WHEN IMPUTABLE TO PRINCIPAL.** An attorney of a debtor, employed to effect a composition with the latter's creditors, gave his personal promise in writing, and afterwards paid to one of the creditors a sum in excess of the amount agreed on and accepted by the other creditors. *Held* (1) That the knowledge of the attorney in the matter of giving such preference was, in law, the knowledge of the principal, and (2) that the failure of the attorney to disclose to another creditor the fact of such preference was the concealment of a material fact and invalidated the composition.
2. **Practice : APPEAL FROM COURT OF APPEALS.** In a cause appealed from a court of appeals, the judgment, if right, will be affirmed, although said court may have assigned other than the correct reasons therefor.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

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Broadhead & Haeussler, D. H. McIntyre and Cecil V. Scott for appellant.

(1) The court below erred in assuming that the defendant was responsible for the unknown and unauthorized promise made by Dickson to Levy & Brother. *Laurence v. Clark*, 36 N. Y. 128; *Carroll v. Shields*, 4 E. D. Smith, 466; *Wyllie v. Potter*, 32 L. J. Ch. 782; *Jones v. Smith*, 12 L. J. Ch. 332; *Nat. Ins. Co. v. Minch*, 53 N. Y. 144; *Barnes v. Trenton, etc.*, 27 N. J. Eq. 33. (2) The principal will not be affected by notice to the agent of any facts outside of the scope of his agency. *Roach v. Kerr*, 18 Kans. 520; *Adams Express Co. v. Trego*, 35 Md. 47; *Congar v. Ry. Co.*, 24 Wis. 157; *Smith v. Water Commissioners*, 38 Conn. 208; *Wells v. Am. Exp. Co.* 44 Wis. 342; *Mound City Life Ins. Co. v. Twining*, 19 Kans. 380; *Tate v. Hopkins*, 7 Mo. 420; *Taylor v. Labaume*, 14 Mo. 572; 1 Mo. 205. (3) The contract of release was valid from the Bank of Commerce to Hoeber, unless Hoeber, either by himself, or by his authorized agent, practiced a fraud upon the bank. Hoeber did not do it himself. Neither did he do it by his authorized agent, for the act of Dickson could not be called the act of Hoeber by another, unless that other was acting for him. The act of Dickson was not for him, but against him. It was entirely outside of his authority, express or implied, therefore, not binding. It never became binding on Hoeber, because not being binding on him at the time, it could only become so by ratification. This ratification never was given. Therefore, it was no act of Hoeber, either by himself or by another. (4) Ratification can only occur where it is accompanied with a full knowledge of all the facts. 1 Pars. N. & B. 101; Story on Agency, secs. 243-324; *Nixon v. Palmer*, 8 N. Y. 398; *Whitford v. Monroe*, 17 Md. 135. (5) Fraud will not be presumed where all the facts consist as well with

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honesty and fair dealing as they do with an intention to defraud. *Picot v. Bates*, 47 Mo. 392; *Rumbolds v. Parr*, 51 Mo. 592; *Dallam v. Renshaw*, 26 Mo. 533; *Ames v. Gilmore*, 59 Mo. 537; *Kitchen v. Cape Girardeau*, 59 Mo. 514; *Henderson v. Henderson*, 55 Mo. 533; Kerr on Fraud and Mistake, 384. The agent, and not the principal, is responsible to third party for positive malfeasance. *Buis v. Cook*, 60 Mo. 391. The act must be within the scope of the authority committed to the agent. Story on Agency, sec. 165.

Albert Arnstein for respondent.

(1) The only consideration which supports a release of the debtor from the payment in full of his liabilities, is the *bona fide* engagement of the creditors, one contracting with the other, and each with all, to give up the same *pro rata* of their respective demands. *Sage v. Valentine*, 22 Minn. 102; 1 Smith's Lead. Cas. 413; Forsyth on Composition, 104-137; Story's Eq. secs. 373-9; *Kahn v. Gamberts*, 9 Ind. 430; *Breck v. Cole*, 4 Sandf. (S. C.) 79. (2) Where a signature to a composition agreement is obtained by means of a secret promise of preference, the preference vitiates the consideration for the release by the other creditors and the composition is void. *Bastian v. Dreyer*, 7 Mo. App. 332; *Hefter v. Calin*, 73 Ill. 296; *Sage v. Valentine*, 22 Minn. 102; *Reay v. Richardson*, 2 C. M. & R. 422; *Page v. Bent*, 2 Met. 375; *Frost v. Gage*, 6 Allen, 50; *Case v. Gerrish*, 15 Pick. 50. (3) The composition having been made with a secret preference to James Levy & Brother is void, even though Hoeber was ignorant of the preference. *Holland v. Palmer*, 1 B. & P. 95; *Robson v. Caize*, 1 Doug. 228; *Solinger v. Earle*, 82 N. Y. 393. (4) The knowledge and acts of an agent acquired in a performance by him in the course of his agency affect the principal. *Hurvey v. Alberry*, 12 Cent. L. J. 30; *Jeffrey v. Bigelow*, 13 Wend.

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518; *Lock v. Stearns*, 1 Met. 518; *Levassee v. Washburne*, 50 Wis. 200; *Crane v. Hunter*, 28 N. Y. 389. (5) Dickson's testimony was properly admitted. "Privileged communications" extend only to what passes between the attorney and his client. What the attorney does with a *third person* while acting as *agent* for his client is not within the rule. *Graham v. O'Fallon*, 4 Mo. 333; *Crosby v. Berger*, 11 Paige, 377; *Bumsull v. Terry*, 51 Ga. 186; *In re Bellis*, 3 Ben. 386.

RAY, J.—In the trial court the jury found a verdict for the plaintiff, and there was judgment accordingly; from which the defendant appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, and the defendant again appealed to this court. The case is reported in 11 Missouri Appeal Reports, 475. The facts of the case sufficiently appear in the opinion of that court. Upon examination of that opinion, the reasoning and conclusions of that court appear to be well sustained by the authorities cited. The briefs of counsel in this court furnish no sufficient reason for a reversal, and for that reason its judgment is affirmed. All concur.

On re-hearing.

RAY, J.—We adhere to our former ruling in this case, but for the following reasons, that is to say: We affirm the action of the court of appeals, including that of the trial court, upon the distinct ground, as shown by the record in the cause, that the witness, Dickson, was the attorney and agent of defendant in procuring the signatures of said Levy & Brother, and the said plaintiff, as well as others, to the said composition agreement, which is as follows: "We, the undersigned creditors of Gustave Hoeber, of St. Louis, Missouri, do hereby agree and accept in full payment by and satisfaction of all his indebtedness to us and each of us, thirty-five cents on a

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dollar of the same, payment thereof to be made in cash upon acceptance of this offer by all his creditors." And that while said attorney was in the prosecution of his said agency, he procured the signature of the said Levy & Brother to said agreement, by giving them his individual promise or obligation in writing, duly signed by him, to-wit: "In consideration of Levy & Brother signing a paper for a settlement by G. Hoeber with his creditors, I here agree and bind myself to pay to James Levy & Brother, of Cincinnati, Ohio, the sum of \$1,513.50, for their claims against G. Hoeber, upon the condition that G. Hoeber effects a settlement with his creditors at the offer he has made them of thirty-five cents on the dollar, it being understood between said Levy & Brother and me, that if such settlement is not made, this agreement shall be void."

In explanation of this agreement Dickson in his testimony added that, "\$1,513.50 was fifty per cent. of their claim. Thirty-five per cent. of it was to be paid in the regular settlement, and they were instructed to draw upon him for the additional fifteen per cent. at sight" (which, we may add, the record shows was done and paid after the said composition agreement was fully perfected and executed), and that, thereafter, said Dickson, in the further prosecution of his said agency, presented said composition agreement to the plaintiff with the said signature of said Levy & Brother thereto affixed; and procured its signature thereto without disclosing to plaintiff how the said signature of said Levy & Brother had been obtained.

It is, however, earnestly insisted that the the question of Dickson's agency is eliminated from the case. But we disagree with this view of the case and for the following reasons: It is not disputed, as before stated, that Mr. Dickson was employed by defendant to effect the said composition agreement with all his creditors, at thirty-five cents on the dollar, and that, when he called

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on Levy & Brother, in that behalf and for that purpose, they declined to accept thirty-five cents, but demanded fifty cents in settlement of their claims. It is conceded that Dickson thereupon notified Levy & Brother, that he had no authority, directly or indirectly, to offer or pay more than thirty-five per cent.; whereupon Levy & Brother replied that settles or ends it, and the negotiations for the time being ceased. It is not disputed, however, that Dickson becoming 'satisfied that Levy & Brother would not settle for less than fifty per cent. afterwards returned and procured their signature by giving them his individual promise, or undertaking as hereinbefore set out; and that said Dickson as before stated, in the further prosecution of his said agency, in the interest of said defendant, procured the signature of the plaintiff to the composition agreement without disclosing that fact, and that the plaintiff signed the settlement at thirty-five cents on the dollar, and in entire ignorance of the fact that Levy & Brother had or were to receive said additional sum, and under the belief that all the creditors, whose names were affixed, including said Levy & Brother, were also receiving the sum of thirty-five cents on the dollar and no more. The instruction for plaintiff submits to the jury whether Dickson was acting as the attorney of defendant, in making the composition agreement, and whether after procuring the signature of Levy & Brother to the composition, he procured the signature of plaintiff without informing plaintiff of the agreement with Levy & Brother. The evidence offered by defendant and excluded by the court was intended to show that in point of fact defendant had no actual knowledge of Dickson's agreement with Levy & Brother, until after he had completed his compromise, and paid the stipulation composition, and that he never authorized or ratified the preference given to Levy & Brother, and that he repudiated the agreement of Dickson to pay the

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fifteen per cent. additional, and refused to pay the same, directly or indirectly, and that he had acted fairly throughout the entire transaction.

The agreement of Dickson to give Levy & Brother a preference of fifteen per cent. was, however, connected with and grew out of the subject-matter of the composition which Dickson was employed by defendant to effect, and whether known to defendant or not was immaterial. The defendant intrusted Dickson with the duty and employment of making the settlement with the plaintiff. The preference given by Dickson to Levy & Brother, and his knowledge thereof, to him in the course of this transaction and while engaged in making the settlement in defendant's behalf, and the law charges the defendant with knowledge thereof, and in such circumstances renders it obligatory upon him, in favor of the party misled thereby. Story on Agency, section 140, and authorities cited in note 1; *Ibid.* sec. 443, and authorities cited; *Chouteau v. Allen*, 70 Mo. 341, 291; *Hayward, Assignee, v. Ins. Co.*, 52 Mo. 181; *Harriman v. Stowe*, 57 Mo. 93; *Ford v. French*, 72 Mo. 250; *Livermore v. Blood*, 40 Mo. 48.

The composition agreement submitted by Dickson in defendant's behalf to plaintiff, upon its face shows that the creditors executing it had thereby agreed to accept thirty-five per cent. in full of their several demands, and the failure of Dickson to disclose the preference to Levy & Brother, a knowledge of which by the agent the law imputes to the principal, was a concealment of a material fact and upon which the law attaches an infirmity to the contract, and we place our judgment distinctly upon these grounds. If this view of the law be correct, the evidence excluded by the court was irrelevant and immaterial.

The court of appeals seems to have placed its affirmance of the judgment of the lower court upon the broad ground, that a composition agreement between a debtor

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and all his creditors is rendered void by the fact that one of the creditors was induced to sign the agreement by the officious act of a third person in agreeing to pay him something in addition to the amount he was entitled to receive under the composition agreement, which agreement with the third person was concealed from the other creditors until after the composition had been signed and the settlement fully executed, of which agreement between the third party and the particular creditor the debtor was wholly innocent. As already indicated, Mr. Dickson, in our judgment, held a different relation under the law to the transaction and to the parties to this action, from that of an entire stranger, or a mere volunteer third party or intermeddler, and for this reason we do not now feel called upon or required to pass upon the question, whether a debtor, though entirely honest and fair with all his creditors, may be deprived of his composition, solely upon the ground of inequality among his creditors, wholly irrespective of law or by whom that inequality may be brought about. Such a case is not before us, and it will be time enough to decide it when it arises. Whereupon the undisputed fact the decision of the lower court is right, its judgment or appeal will not be reversed, for the reason (if such be the case) that the court in rendering its judgment, may have assigned other than the appropriate or correct reasons therefor. For these reasons, the judgment of the court is affirmed. All concur.

CALDWELL *et al.* v. SMITH *et al.*, *Appellants.*

The finding and decree of the lower court setting aside a conveyance as being in fraud of creditors reversed because not supported by the evidence.

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Appeal from Buchanan Circuit Court.—HON. JOS. P. GRUBB, Judge.

REVERSED.

Strong & Mosman for appellants.

(1) The evidence shows that all the plaintiffs, except, possibly, Caldwell, were subsequent creditors. (2) Under the evidence, the court should not have rendered a decree in favor of the subsequent creditors. *Payne v. Stanton*, 59 Mo. 158; *Pepper v. Carter*, 11 Mo. 540; *Belford v. Crane*, 16 N. J. E. 265. (3) The proof failed to show that the conveyance was voluntary, and there was, also, a total failure to sustain the charge that it was not *bona fide*. There was no evidence of an intent to defraud on the part of Charles G. Smith, as charged, nor a participation in such intent by defendant. (4) The defendant had a right to make the conveyance in question to save his own credit. *Murray v. Cason*, 15 Mo. 378; *Gates v. Lebaume*, 19 Mo. 17; *Ames v. Gilmore*, 59 Mo. 537; 1 Mo. App. 371.

Smith & Krauthoff also for appellants.

(1) If the conveyance was not voluntary, it is good against all creditors, both existing and subsequent, unless made for a fraudulent purpose in which the grantee joined the grantor. *Shelley v. Boothe*, 73 Mo. 75; *Ryan v. Young*, 79 Mo. 30. The decree in this case proceeds on the theory of a conveyance for a consideration. (2) And even if the deed be held to be voluntary, it was only void as to the then (June, 1873) existing creditors, Caldwell, and possibly Tyner, and could only be held void as to subsequent creditors, if shown to have been made with the actual intent to defraud them. *Hurley v. Taylor*, 78 Mo. 248; *Bayha v. Kessler*, 79 Mo. 555.

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(3) Fraud must be shown, the mere assumption of it is not warranted. *Funkhouser v. Lay*, 78 Mo. 458; *Ames v. Gilmore*, 59 Mo. 537; *Henderson v. Henderson*, 55 Mo. 555; *Rumbold v. Parr*, 51 Mo. 592; *Durkee v. Chambers*, 57 Mo. 575. (4) The testimony of the widow of the grantor, detailing the conversations of her deceased husband, was incompetent. R. S., sec. 4014; *Holman v. Backus*, 73 Mo. 49; *Buck v. Ashbrook*, 51 Mo. 540. (5) And all the evidence of the declarations of Charles G. Smith, grantor, made after the transaction and in the absence of Abram P. Smith, grantee, without any proof *aliunde* of the alleged agreement to commit a fraud, was inadmissible. *Durkee v. Chambers*, 57 Mo. 581; *Boyd v. Jones*, 60 Mo. 471; *Bank v. Russell*, 50 Mo. 534.

Johnston & Anthony for respondents.

(1) The court did not commit error in permitting the widow of Charles Smith to testify, she being a party in interest in the case. R. S., 1879, sec. 4010; *Fugate v. Pierce*, 49 Mo. 441; *Evers, Trustee, etc., v. Life Association*, 59 Mo. 429. (2) Fraud must be proved, but it is not necessary that direct or positive evidence be produced. It may be inferred from the situation of the parties and the circumstances surrounding their transactions. *Hopkins v. Williams*, 58 Mo. 201; *King v. Moon*, 42 Mo. 551; *Bump on Fraud. Convey.* (2 Ed.) 581-2. (3) The finding of the court is supported by the evidence. (4) The finding and judgment of the court are not against the law of the case, for at the time the deed was made by Charles he was largely indebted and insolvent, and said deed was made to hinder his creditors from collection against him, and a part of the plaintiffs in this case were then creditors, if not all of them, and where subsequent creditors can show that a deed was made to defeat prior creditors, such subsequent creditors, after the deed is set aside, will be permitted to participate in the fund.

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Bump on Fraud. Convey. (2 Ed.) 316-17; *Savage v. Murphy*, 34 N. Y. 568; *Kerr v. Smith*, 20 Wall. (U. S.) 36; *Winchester v. Charter*, 12 Allen (Mass.) 606; *Horn v. Volcam Water Co.*, 13 Cal. 62; 1 Am. Lead. Cases, side page 40; 1 Story Eq. Juris. (Redf. Ed.) sec. 361.

HENRY, C. J.—This suit is to set aside a conveyance of land made by Charles G. Smith to his brother, Abram P. Smith, on the fifteenth of June, 1873. The land conveyed was all the land owned by said Charles G., and lay in Andrew county, Missouri. The plaintiffs are creditors of said Charles, who died in February, 1876. The circuit court rendered a judgment setting aside the conveyance, from which defendant, Abram Smith, has appealed to this court. The plaintiff's demands allowed against the estate aggregate about \$1,300, and the land in controversy, at the date of the conveyance, was worth between seven and eight thousand dollars. The debts of C. G. Smith at the time of the conveyance to his brother, excluding the debt to the latter, were inconsiderable compared with the value of the land conveyed, and the personal property owned by him. The petition charges that, at the time of the conveyance, C. G. Smith was insolvent. That the conveyance to Abram was without consideration, and made with intent to defraud the creditors of C. G. If the debt claimed by Abram be excluded from C. G.'s liabilities, the testimony shows that he was not insolvent, owing less than three thousand dollars, and owning property worth between ten thousand and eleven thousand dollars.

Upon these undisputed facts it is difficult to conceive a motive for the conveyance, inconsistent with good faith. It is not alleged that it was made to enable the grantor to defraud subsequent creditors, and the debts subsequently contracted by the grantor are not of a magnitude to warrant such an imputation. But, aside from all this, we think that the testimony establishes the *bona fides* of the transaction.

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The wife and children of C. G. Smith testified to declarations made by C. G. Smith, before the deed was executed, to the effect that he intended to make the conveyance in order to get time to settle his security debts, about one thousand dollars. They do not say that C. G. Smith was not indebted to Abram in the amount named as the consideration for the deed. They did not pretend to know. They had no conversation with Abram on the subject, and their testimony, and a letter from Abram to Charles, dated May 1, 1872, in which he acknowledges the receipt of a draft for \$2,210, and states that it leaves in his hands a balance of one hundred and three dollars in Charles' favor, and asks what he shall do with it, is the principal evidence relied upon to establish the allegations of the petition. The plaintiffs took and read the deposition of Abram Smith, in which, in a candid, clear and straightforward manner, he gives an account of the transactions between himself and his brother, showing the latter indebted to him for money borrowed, in the sum of about \$5,600, and, as to the several items of that indebtedness, is corroborated by another brother, and by Ayres, Ribbie, Ratskin, Hatfield and Sanders, citizens of the highest respectability of Morgan county, Illinois, merchants, bankers and lawyers. Charles G. Smith lived in that county for many years, until 1865, when he immigrated to this state. He owned a small farm in Illinois, upon which there was a mortgage. He was greatly embarrassed, and the evidence tends to prove that he was in fact insolvent. His brother Abram assumed and paid a number of his debts, and loaned him \$1,300 when he left for Missouri. In March, 1868, \$2,700, and these amounts, added to the debts of his brother, which he had assumed and paid, aggregate \$5,600. He explains in his testimony, the letter written to Charles, in which he acknowledged a balance of one hundred and three dollars due to Charles, as follows: That in the fall of 1871 he loaned Charles two thousand dollars, and, in

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May, 1872, received the draft for \$2,210, which was one hundred and three dollars more than enough to pay the debt and asks what he should do with it, and was told to pay a physician's bill, twenty-five or thirty dollars, which he did, and remitted the balance to Charles. Mr. Ayres, a member of the banking firm of M. P. Ayres & Co., doing business at Jacksonville, Illinois, testified that their books showed numerous checks drawn by Abram in favor of C. G. Smith, from 1865 to 1868, and among them a check for two thousand dollars October 1, 1866.

It will be observed that Charles had a large family, thirteen or fourteen children, and was in an embarrassed condition, including in his indebtedness what he owed the defendant. Abram had been assisting him, advancing him money for the purchase of cattle, and dividing the profits with him, and it is by no means strange that, instead of crediting that small balance upon his large claims against his brother, he remitted it to him. He felt that what Charles owed him was safe, for he testifies that he did not know the extent of his indebtedness to others, and, if he had, it was not of an amount to make him uneasy. In 1873, at the instance of Charles, he took the land in payment of his debt. No witness contradicts Abram Smith as to any fact testified to by him, while, as to nearly every fact stated by him, he is corroborated by other disinterested witnesses. There is no evidence of any fraudulent intent on the part of Charles, except his declarations to his wife and children, and the most charitable view of their testimony is to admit that C. G. Smith made the statement testified to by them; but the record discloses a motive for his concealment from them of the amount of his indebtedness to Abram. One of the sons testifies that in a conversation between his parents, his mother was fretting, and his father told her that "by being saving it would not be long before she could get it back again."

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No doubt his purpose was to conceal from his wife the extent of his indebtedness, and thus relieve her of the anxiety on the subject, which made her uneasy and fretful; but the evidence does not leave room for doubt that Charles owed Abram \$5,600 for borrowed money, with interest on \$2,900 from 1865, and on \$2,700 from March, 1868. Mr. Sanders, an old and intimate friend of C. G. Smith, testified that he saw C. G. Smith at Savannah, a few days before the deed was made, and Smith told him he was going to Illinois to secure Abram for the money he owed him. Said Abe had helped him when he needed it, and he thought he ought to secure him while he could. Saw him again after he returned from Illinois, and Charles said that on a settlement with Abe they found he owed Abe as much as the land was worth, and he had deeded the farm to pay it. The preponderance of the evidence on every issue made by the pleading is against the plaintiffs, and the judgment is reversed and the cause dismissed. All concur.

LESLIE V. THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Practice: VARIANCE: FAILURE OF PROOF.** The rule that a plaintiff cannot declare upon one cause of action and recover upon a different one prevails under the code, but Revised Statutes, sections 3565 and 3702, recognize a plain distinction between a variance and a total failure of proof.
2. **Variance.** In this case there was no substantial variance between the negligence charged in the petition and the evidence.
3. **Carrier of Passenger.** The undertaking of a common carrier of passengers is to carry the latter without fault or negligence, but the carrier is not an insurer against accidents.
4. **Negligence: ALIGHTING FROM CAR.** For one, voluntarily and not

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to avoid some threatened danger, to jump from a train of steam cars while in rapid motion, is negligence, but to step from a car, while in motion, to a station platform, may or may not be negligence.

5. **Question of Fact.** Whether the latter is or is not negligence is a question of fact for the jurors to determine from the attending circumstances, and in such case the better practice is to submit the question, by leaving it to the jurors to determine whether a prudent person, in a like situation and under similar circumstances, would have made the step or leap.

Appeal from Chariton Circuit Court.—A. H. WALLER, Esq., Special Judge.

AFFIRMED.

Wells H. Blodgett, G. B. Burnett and G. S. Grover for appellant.

(1) The proof failed to sustain the material averments of the petition. *Merle v. Hascall*, 10 Mo. 406; *Burk v. Ferrard*, 19 Mo. 301; *Jones v. Londerman*, 39 Mo. 237; *Harper v. Ry.*, 44 Mo. 488; *Cape Girardeau, etc., v. Kimmel*, 58 Mo. 83; *Buffington v. Ry.*, 64 Mo. 246; *Waldhier v. Ry.*, 71 Mo. 514; *Edens v. Ry.*, 72 Mo. 212; *Price v. Ry.*, 72 Mo. 414. (2) The second instruction given for plaintiff was erroneous; (a) it incorrectly stated the law applicable to carriers of passengers; (b) it directed the attention of the jury to a fact not in evidence; (c) it authorized a recovery upon a cause of action not stated in the petition. (3) The court refused legal and proper instructions asked by defendant.

John Montgomery, Jr., and U. S. Hall for respondent.

(1) The facts proven on the trial fully support the averments of the petition. (2) The instructions given announce correctly the law governing the whole case.

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BLACK, J.—Plaintiff was a passenger on one of defendant's trains from a point in Iowa to Brunswick. He sues because of injuries received while getting off at the latter place. The questions presented arise from the refusal of the court to sustain a demurrer to the evidence, and in giving instructions. Involved in these rulings, it is contended the plaintiff declared upon one cause of action and was permitted to recover upon another. Plaintiff had been at Brunswick certainly twice before the time in question. He testified that the trains stopped three or four times after reaching the city limits; some one said there was a freight train on the track; he did not get up as other passengers did. He says the train pulled up to the platform at the depot, stopped, and was standing still, when he was on the steps of the car with his baggage; as he was in the act of getting off, the train suddenly jerked, and he fell between the car and the platform and was injured; that the platform was a long one and well lighted; that the conductor got off just in advance of him and was on the platform; that the station had been previously announced, and that hacks and hotel runners were standing around. The conductor says in passing the west end of the platform the train was running very slow and he got off; that it stopped and started up again, and as it was starting he saw the plaintiff falling; he ordered the brakeman to pull the bell; he grabbed the plaintiff, when the train stopped again. The passengers were then unloaded, when the train pulled up about one hundred feet further to the usual stopping place, where the baggage was unloaded, and then the train was switched for the night. It went no further. He says the first stop at the platform was on account of getting too close to a freight train, and his train started up when that one was out of the way. There was other evidence tending to show that the brakeman told the passengers not to get out.

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Other evidence tended to show that plaintiff attempted to get off while the train was in motion, though plaintiff's evidence, and that of the conductor is not materially different. The engineer and plaintiff had a conversation after the accident. Plaintiff says his statement then made was: "When the train slowed I thought it was going to stop and I jumped off, or went to get off and fell. I think I could have saved myself if I had not been so heavily loaded, even though the train jerked as I went to get off the car. As to saying it was my fault, I never uttered such a word or said such a thing. * * * I said it started as I went to step off, or get off, I don't recollect the word. I did not jump off; it started as I went to get off."

The first instruction given at the request of the plaintiff is as follows:

"1. The court instructs the jury that the plaintiff had a right, after the name of the station was announced, to infer that the first stop of the train at the platform was at the station, and when the train came to a full stop, if the jury believe it did come to a full stop, opposite the platform of the station, and the conductor had stepped off his train with his lantern immediately preceding said stopping, if any, the plaintiff was warranted in believing the proper time had arrived for him to leave the train, unless the jury believe he was warned or directed not to alight then; and if the jury believe from the evidence that said train came to a full stop opposite the platform of this station, and the plaintiff, in the exercise of such care as a prudent person would have used, undertook to leave the train, and through the sudden starting of the same was jerked or thrown therefrom, or fell upon the platform, and between it and the cars, and was injured as charged in the petition, your finding and verdict must be for the plaintiff."

1. The substance of the petition is, as to the first averment, that defendant's servants did not stop the train a

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sufficient length of time to allow plaintiff to get off on the platform provided for the use of passengers. The contention is that this allegation charges the negligence to have been in failing to stop the train a sufficient length of time to enable plaintiff to get off, when the bulk of the evidence shows that the train did stop at the platform a sufficient length of time. In other words the negligence, if any there was, was not in failing to stop a sufficient length of time, but in stopping and starting at a place opposite the platform, other than the usual stopping place. Looking at this single allegation in the petition on the one hand, and the evidence as a whole, and the instructions before noted on the other, there is some ground for the claim made. But the petition makes no reference to the usual stopping place. It also alleges: "On the contrary when the train reached the depot and plaintiff was on the edge of the steps and before he had time to leave them, the said servants negligently, suddenly, and unexpectedly, moved and jerked the train forward," etc. Taking the petition, all in all, there is no substantial variance between it and the proofs, much less a failure of proof. The rule that a plaintiff cannot declare upon one cause of action and recover upon another is everywhere conceded: 10 Mo. 406; 19 Mo. 30; 24 Mo. 598; 69 Mo. 626. The rule in this respect has not been changed by the practice act. 39 Mo. 287. But sections 3702 and 3565, Revised Statutes, recognize a plain distinction between a variance and failure of proof. When the train arrived at the depot and stopped, opposite the platform, the plaintiff, as a reasonable man, could come to no other conclusion than that it was the place to get out. As to him, it was the proper stopping place, unless informed to the contrary, and if he was so warned, then, under the instructions, he could not recover. The petition gave the defendant full information of the grounds upon which plaintiff sought a recovery, and that is the reason of the rule before noted.

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2. The second instruction for plaintiff asserts the proposition "that defendant was bound to exercise the highest degree of care in carrying plaintiff from the place where he entered the train to, and deposit him safely at the place of destination ; and that plaintiff had a right to rely upon the direction and actions of the servants in charge as to when they arrived at the station. The duty of a carrier towards a passenger has been variously stated in the abstract. It is certainly a duty of the highest order. The undertaking is to carry the passenger without fault or negligence. "It has been accordingly held that passenger carriers bind themselves to carry safely those whom they take into their custody as far as human care and foresight will go, that is for the utmost care and diligence of every cautious person ; and of course they are responsible for any, even the slightest neglect." This statement of the rule in Story on Bailments, section 601, has met with the approval of this court. *Lemon v. Chancellor*, 68 Mo. 340 ; *Gilson v. Ry. Co.*, 76 Mo. 282-7. But as to passengers, a carrier is not an insurer against accidents. As a general statement of the liability, the instruction is not objectionable. The instruction proceeds to state hypothetically the facts upon which the plaintiff may recover. These facts sufficiently qualify the general proposition. There was certainly evidence that the station had been called. That was a direction to the passengers to prepare to get out. The train was stopped by the servants at the depot. Upon what else could a passenger act ? It is not shown to be the custom to give any further or additional notice. There was, we think, evidence upon which to base the instruction.

3. For the defendant, the court told the jury that if "plaintiff was guilty of negligence in stepping from the train in question while the same was in motion, and that his stepping from said train was the proximate cause of the injury complained of, then the law is that

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the plaintiff cannot recover, and the jury must find for the defendant."

"8. If the jury believe from the evidence that while the train in question was moving up to its usual stopping place, the plaintiff, while the train was in motion, voluntarily, and contrary to the advice or instruction of the brakeman of said train, stepped from said train, and was injured in consequence thereof, then the law is that the plaintiff cannot recover, and the jury must find for the defendant."

Several instructions asked by the defendant were modified by the court. The second, as asked, told the jury that if plaintiff voluntarily leaped from the train while in motion, then he could not recover. This the court modified so as to make it read voluntarily and "negligently," etc. For one to jump from a train of steam cars while in rapid motion, voluntarily, and not to avoid some threatened danger, is negligence, but to step from a car while in motion to a station platform, may or may not be negligence. Whether it is or not is a question of fact for the jurors to determine from all the circumstances. *Doss v. Railroad Co.*, 59 Mo. 27; *Kelly v. Railroad Co.*, 70 Mo. 607. It would be better, in such cases, to submit the question by leaving it to the jurors to determine whether a prudent person in a like situation, and under like circumstances, would have made the step or leap. But here the court in the preceding instruction, given on the same subject, left it to the jurors to determine whether "such getting off the train was, under all the facts and circumstances of the case, negligent;" and in the plaintiff's first instruction it is made a condition of recovery that he was in the exercise of such care as a prudent person would have used, when he undertook to leave the train. Taking the instructions as a whole, they are fair enough. The essential elements of defendant's fourteenth instruction were embraced in the fourth given.

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The judgment is affirmed. Henry, C. J., and Sherwood, J., dissent. The other judges concur.

HENRY, C. J., DISSENTING.—I have not the time to do more than to very briefly state the grounds of my dissent from the majority opinion. The cause of action stated in the petition is the failure of the defendant to stop its train long enough for him to get off at Brunswick; and that, in attempting to leave the car, he was injured. The cause of action proved, if any, was not that it did not stop a sufficient length of time at its usual stopping place, to enable plaintiff to get off, but that by the negligence and carelessness of defendant's servants, he was induced to believe that they had, when in fact they had not, reached the place at which they stopped to let passengers leave the cars. I deem it unnecessary to cite authorities in support of so elementary a proposition as that the plaintiff must recover, if at all, upon the cause of action alleged, and not upon one which he might have stated, but did not.

MISSOURI GLASS COMPANY, *Appellant*, v. COPELAND SEWING MACHINE COMPANY.

1. **Practice.** A motion in the nature of a demurrer to a plea in abatement should be directed against the objectionable part of the plea.
2. **Attachment: PRACTICE IN SUPREME COURT.** The Supreme Court will not reverse a judgment in an attachment suit on the ground that plaintiff's motion to strike out the plea in abatement should have prevailed, it appearing that the plaintiff had a fair trial on the plea and failed to sustain the issues joined by any evidence on his part.

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Appeal from Greene Circuit Court.—HON. W. F. GEIGER, Judge.

AFFIRMED.

F. S. Heffernan for appellant.

(1) The plaintiff's motion to strike out the defendant's plea in abatement should have been sustained. *Cannon v. McManus*, 17 Mo. 345. (2) The court erred in instructing the jury to find the issue for defendant. *Crookshank v. Kellogg* (Blackf.) 8 Ind. 257. (3) The defendant cannot plead to the merits of the action in denying being a member of the firm, and at the same time plead controverting the affidavit for attachment. *Drake on Attachment* (4 Ed.) sec. 406; *Meggs v. Shaffer*, Hardin, 65; *Lindsley v. Malone*, 23 Pa. St. 24; *Hartory v. Shuman*, 13 Mo. 547; *Cannon v. McManus*, 17 *Ibid.* 345; *Collins v. Nichols*, 7 Indiana, 447. (4) Defendant's denial of the allegation in the plaintiff's petition that he was a member of the Copeland Sewing Machine Company is a plea to the merits, and waived the plea in abatement. *Fordya v. Hathorn*, 57 Mo. 120; *Mississippi Planing Mill v. Presbyterian Church*, 54 Mo 520; *Ely v. Porter*, 58 Mo. 158.

W. D. Hubbard and *H. E. Howell* for respondent.

(1) Plaintiff's motion to strike out defendant's plea in abatement was properly overruled, because the statement in the beginning of his plea, that he was not a member of the Copeland Sewing Machine Company, is plainly a mere introduction to and part of his denial of the causes of attachment. (2) The motion of plaintiff to strike out was in effect a demurrer. *Austin v. Loring*, 63 Mo. 19. By going to trial and not standing on his motion, plaintiff waived its right to have the

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action of the court overruling its motion revised by this court. *Ely v. Porter et al.*, 58 Mo. 158 ; *Fuggle, Adm'r, v. Hobbs*, 42 Mo. 538, 541. (3) There was no evidence whatever to sustain this attachment as against this respondent and the trial court properly instructed the jury to find the issues for him. *Boland v. Missouri Railroad Company*, 36 Mo. 484.

SHERWOOD, J.—It is not necessary to consider the action of the trial court in denying plaintiff's motion to strike out the separate plea in abatement, filed by defendant, J. W. Copeland, since, whether that motion was properly denied or not, cannot affect the result reached by the jury in trying the separate plea in abatement. But granting that it be necessary to rule the point, still the action of the trial court may well be upheld and this upon the ground that the motion, being in the nature of a demurrer to the plea, asks too much and should have been directed against that which was objectionable in the plea and no more. In one view, a view sustained by the analogies of the law in somewhat similar cases, the plaintiffs by going to trial on the plea in abatement, after their motion to strike out had been denied, may be deemed, perhaps, to have waived any defects in the plea ; but even if this be not true, still the fact remains that on the trial of the plea, no evidence was introduced to show that J. W. Copeland, sued in attachment and made a defendant, had done any of the acts alleged by plaintiff as grounds for that attachment.

In such circumstances as these, to reverse the judgment on the sole ground that the motion to strike out the plea in abatement should have prevailed, notwithstanding that plaintiffs had a fair trial on the plea and failed to sustain the issue joined by any evidence on their part, would be going further than we think the law requires us to go. Therefore, judgment affirmed. All concur.

Ledbetter v. Ledbetter.

LEDBETTER, *Appellant*, v. LEDBETTER.

1. **Pleading.** Traverses and answers in avoidance may be joined when not inconsistent.
2. **Ejectment: ANSWER: JOINDER OF DEFENCES.** A defendant in ejectment may plead a general denial and rely upon that as a complete defence, and may also, in the same answer, plead and rely upon an equitable defence, but the pleadings should be so framed as to show that both defences are relied on.
3. ———: ———. If in pleading his equity the defendant unqualifiedly pleads the legal title or right of possession out of himself and in the plaintiff, the latter will not be required to offer any evidence of his title, especially if he waives damages, rents and profits.

Appeal from Barton Circuit Court.—HON. CHARLES G. BURTON, Judge.

AFFIRMED.

Robinson & Harkless for appellant.

(1) The answer of the defendant very evidently proceeds on the theory that plaintiff did not have a regular chain of title, but that C. H. Brown acquired his deed from J. C. Ledbetter, and J. F. Ledbetter from C. H. Brown, with full notice of defendants' equity, and in fraud of their rights, and under plaintiff's general denial, the issue presented was as to defendants' equity, and it devolved upon them to prove it. Bliss Code Pleading, sec. 340. Again, the answer, although containing in the first count a general denial, in the second count proceeds with a general confession of plaintiff's legal title, and an avoidance on the ground of fraud. 1 Chitty Pleadings (11 Am. Ed.) 526; Stephen's Pleadings (8 Am. Ed.) 200; Bliss Code Pleadings, sec. 340.

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D. B. Van Syckel for respondent.

The answer contains two consistent defences: 1st, general denial; 2d, an equitable defence. The first answer, or general denial, casts upon the plaintiff the *onus probandi* as to the title and also the right to immediate possession, as well as every material allegation of his petition or complaint, regardless of what may be contained in the second answer of the defendant in this action. *Sturdevant v. Rehard et al.*, 60 Mo. 152. But defendant's second defence, neither as a whole nor as a part, admits the legal title to be in the plaintiff; but distinctly avers the defendant has been in possession since 1878; and besides that, she had the legal title as *cestui que trust* since 1874. 23 Mo. 457; 36 Mo. 523. The answer expressly denies that the legal title is in plaintiff by stating that the "pretended title" of C. H. Brown was attempted to be conveyed to J. F. Ledbetter.

BLACK, J.—This is an action of ejectment commenced in 1881. On the trial before the court without a jury, it was admitted that J. C. Ledbetter was the common source of title, and that defendant was then, and had been, since April, 1878, in possession of the land in dispute. The plaintiff offered no evidence. The court ruled that plaintiff was not entitled to recover, and accordingly gave judgment for the defendant, from which plaintiff appealed.

The answer contains two defences: 1st, a general denial; 2d, an equitable defence. The plaintiff's theory is that the admission taken in connection with the pleadings as a whole, made out his case. The defendant, even in an action of ejectment, may plead as many defences as he may have, legal or equitable, or both. The only limit is that by the practice act they must be consistent. Ordinarily, a statement of new facts showing a non-liability, impliedly at least admits a liability, but for

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such new facts. Hence, it is often said an answer setting up new matter by way of defence should confess and avoid the plaintiff's cause of action. *State to use, etc., v. Williams*, 48 Mo. 212; 1 Chitty Plead. (16 Am. Ed.) 551. But the confession is not necessarily an absolute one. It need not be made in terms. It is often only implied from the nature of the defence, or assumed for the purpose of the particular defence. Bliss Code Pleadings, sec. 341. Traverses and answers in avoidance may go together where not inconsistent. In *Hopper v. Hopper*, 11 Paige, 46, it is said the defendant "cannot set up two defences which are so inconsistent with each other that if the matters constituting one defence are truly stated, the matters upon which the other defence is attempted to be based must necessarily be untrue in point of fact. But the defendant may deny the allegations upon which the plaintiff's title to relief is founded, and may, at the same time, set up in his answer any other matters not wholly inconsistent with such denial." In *Nelson v. Brodhack*, 44 Mo. 599, in speaking of consistent defences, Bliss, J., says: "The right will be secured if the consistency required be one of fact merely, and if the two defences are held to be inconsistent only when the proof of one necessarily disproves the other." See, also, *McAdow v. Ross et al.*, 53 Mo. 202; *State ex rel. Davis v. Rogers*, 79 Mo. 286. The defendant, therefore, in an action of ejectment, may plead by way of a general denial, and rely upon that as a complete defence. He may also, in the same answer, plead an equitable defence and rely upon that as an independent defence. But the defendant will frame his pleading so as to show that he relies upon both defences. If in pleading his equity he unqualifiedly and absolutely pleads title or right to the possession out of himself and in the plaintiff but for the equities, then we see no reason why the plaintiff should be required to offer any evidence, especially if he waives damages, rents and profits. If the defendant will make

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such an absolute admission on the record, it is difficult to see how there can be an accompanying denial of the same matter. Pleadings are expected to tell the truth.

Now the second defence in substance states that J. C. Ledbetter, the husband of the defendant, owned the land, and in 1874 conveyed the same to C. H. Brown in trust "for the sole, separate, and only benefit of the defendant." It further states that to reconcile some family difficulties, and for a valuable consideration, the husband and wife undertook to make a conveyance of the property to Hay, and Hay to the defendant, but by mistake the parties failed to affix to the deeds their seals; that thereafter, to defraud defendant, J. C. Ledbetter made a deed to Brown, intending to convey the land to him, and that Brown attempted to convey this pretended title to plaintiff, who had full notice, etc. Now, laying out of view the deed of trust, the answer shows that the husband owned the property, and this was also admitted on trial, and it shows that the plaintiff holds that title subject to defendant's equities, which, if truly stated, would constitute a complete defence. If nothing more had been stated we see no reason why the plaintiff should in the first instance be put to further proof. But the answer also shows that J. C. Ledbetter had previously conveyed the land to Brown in trust for defendant's sole use. That was the prior and paramount title and conveyed the fee according to the answer, and the answer does not appear to assert that Brown attempted to convey this title which he held as trustee, if indeed he could without defendant's consent, but rather asserts that he conveyed to the plaintiff the pretended title subsequently acquired from the husband. Taking the second defence as a whole, we do not see that plaintiff got any title at all, and the ruling was, therefore, correct.

The judgment is affirmed. All concur.

Johns v. Fenton.

JOHNS *et al.*, Appellants, v. FENTON.

1. **Dower : STATUTE OF LIMITATIONS.** The statute of limitations does not commence to run against a widow's dower until it has been assigned.
2. ——— : **STALENESS OF DEMAND.** Nor is staleness of demand any defence to an action for admeasurement of dower.
3. **Dower, Parol, Assignment of.** Dower may be assigned by parol.

Appeal from Lawrence Circuit Court.—HON. M. G. MCGREGOR, Judge.

REVERSED.

N. Gibbs for appellants.

(1) In this state the statute of limitations does not run against the action for admeasurement of dower in real estate, and lapse of time is no bar to a right of dower. *Littleton v. Patterson*, 32 Mo. 357, 364-5-6; R. S. Mo., 1835, pp. 392-393; R. C. Mo., 1855, p. 1045.

(2) It is only where a party brings his suit in a court of equity, and invokes equitable relief, that the courts have ever held that the staleness of the claim was a bar to the claim. The staleness of a claim is a defence against an equity case, only. The case at bar is an action at law, for the admeasurement of dower, and the staleness of the claim, and the lapse of time, is no defence against this action, and appellants' motion to strike out that part of respondent's answer which set up the staleness of appellants' claim, should have been sustained. 2 Story's Eq. Jur. (12 Ed.) sec. 1520, and note 4; 2 Scribner on Dower, p. 153, sec. 32; *Sarrow v. Beam*, 10 Ohio, 498. In Missouri time does not run against a claim of dower, and a claim cannot grow stale when time

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is not running against it. (3) This is stated expressly in equity suits,—commenced in a court of equity, and has no reference to a law action,—begun in a law court; in all such cases the law statute of limitations alone applies; and if there be no limitation to such an action, *i. e.*,—at law and in a law court, why equity will not interpose, and bar the action by an equitable limitation. 2 Scribner on Dower (1 Ed.) pp. 531-2, sec. 14, citing 2 Story's Eq. sec. 1520. (4) This is a suit to admeasure and set off the widow's dower. It is the heir's duty to set off the dower, and her non-demand thereof is not laches in her. (5) The appellant was on the day she was deforced of her dower and ever since that day has been and still is under the disability of coverture. No laches can be charged to one while under such disability. *Sutton v. Casseleggi*, 77 Mo. 397; 2 Perry on Trusts, sec. 867; *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352.

H. Brumback for respondent.

(1) The court did not err in overruling plaintiffs motion to strike out the part of the answer which set up the staleness of the demand. *Tuttle v. Wilson*, 10 Ohio, 26; *Ralls v. Hughes*, 1 Dana, 407; *Robinson v. Miller*, 2 B. Monroe, 284; *Barnard v. Edwards*, 4 N. H. 321; *Steiger v. Hilten*, 5 G. & J. 121; *Kiddall v. Trimble*, 1 Md. Ch. Dec. 143; *Carmichael v. Carmichael*, 5 Humph. 96. (2) It is no objection that the action is one at law and the plea of staleness of demand is an equitable one. *Collins v. Rogers*, 63 Mo. 515; *Cape, etc., v. Harbison*, 58 Mo. 96; *State ex rel., etc., v. Meagher*, 44 Mo. 362. Courts of law and equity have concurrent jurisdiction of dower. 1 Story's Eq. sec. 624. (3) The dower was set out to appellant in 1844. Dower may be assigned by parol. 2 Scribner on Dower, p. 66. (4) Her dower, having been assigned to *her*, appellant, the twenty-four years statute

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of limitations began to run against her when she quit the possession thereafter in 1844. R. S. 1879, sec. 3222; *Valle v. Obenhause*, 62 Mo. 84.

SHERWOOD, J.—Suit for the admeasurement of dower. Under the ruling of this court in *Littleton v. Patterson*, 32 Mo. 357, the statute of limitations was held not to run against a widow entitled to be endowed of lands until that her dower be assigned. Speaking on this subject, Dryden, J., in delivering the opinion of the court in that case, said: “The right limited is a *present, existing* right of action or of entry, and none the less so, because the one in whom the right is vested is under some disability to sue. But the wife’s right to dower is not of this sort * * *, she is not laboring under the disability contemplated by the saving clause of the statute to enforce an existing right of action, as would be the case if during coverture she was disseized of an estate that had descended to her, but she is without such right as is actionable. By the death of her husband, her right of action becomes complete. This right, however, is merely a *chose in action*, and not a right of entry or a right of action for possession which depends for its existence on the assignment of dower; and having no right of action or of entry until dower is assigned, her rights are not within the bar of the statute.” And it is said elsewhere, that “Except where specially so provided, a widow’s right of dower is not barred by the statutes of limitations of the several states.” Wood on Limit. of Act., 584.

This cause was not tried below on the theory here laid down; but upon the theory that the staleness of the demand barred any recovery of dower. This in substance is recited in the judgment which went in favor of the defendant, and a declaration of law given on his behalf, states that: “On account of the lapse of thirty-eight years since the death of plaintiff’s former hus-

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band, Patrick, the plaintiff cannot recover in this action against defendant on account of the staleness of her demand." This declaration and judgment are evidently at variance with the rule announced by this court, and the authority above cited, and, therefore, must be held erroneous. Under that rule it is obvious that if the statute of limitations does not apply to actions for the recovery of dower that cases like *Valle v. Obenhause*, 62 Mo. 81, cannot be invoked by defendant as a defence in this action, *i. e.*, until after assignment of dower occurs. And it must be equally obvious that staleness of demand, laches, etc., must be also out of place; for equity, if called on to administer a right *strictly legal* will generally follow the law of the statute. Adams Eq. 227; *Kelly v. Hurt*, 74 Mo. 561, and cases cited. But this is merely an action at law; the remedy at law being adequate and ample, there is no ground for equitable interposition and indeed there is no opportunity therefor, as under the authorities cited no right of action exists in a dowress until dower be assigned; and this being the case, staleness of demand could not arise till after the demand itself arose, by reason of the assignment of dower.

In conclusion, it may be proper to say that there are many circumstances in this transcript, both resting in parol, and of record, which might well be considered by the court or jury trying this cause on its return, as tending very strongly to show that dower was admeasured and assigned the widow Patrick; and if this was the case, then, of course, the statute would begin to run from the period of its assignment, and the widow was barred before this suit was begun. If assigned before the disability of her second marriage, then by the period of ten years. If after incurring that disability, then by the period of twenty-four years. *Valle v. Obenhause*, *supra*; *Poe v. Domic*, 54 Mo. 119. And on the re-trial of this cause, the facts that the land on which dower

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is now asked to be assigned has been in continuous possession and cultivation for so long a period, with the dowress residing, it seems, only some thirty miles away, are sufficient to afford some ground for presumptions favorable to the view that dower by matter of record or matter *in pais* had been assigned to the widow and had been by her transferred, or else, considering its small value at that early period, abandoned to adverse possession. And "dower may be assigned by parol. The widow being entitled by common right, nothing is required but to ascertain her share; and when that is accomplished by the assignment, and she has entered the freehold vests in her without livery of seizin or writing." 2 Scribner on Dower, 66, sec. 3, and cases cited. As to presumptions of the abandonment of rights where failure is made for a long period to assert them, see *Tuttle v. Willson*, 10 Ohio, 26; and as to the other presumptions referred to, see *Long v. Joplin M. & S. Co.*, 68 Mo. 422, and cases cited.

For the reasons aforesaid, the judgment is reversed and the cause remanded. All concur.

SPIVA, *Appellant*, v. THE OSAGE COAL AND MINING COMPANY.

1. **Waiver.** One who voluntarily assumes a risk, thereby waives the provisions of a statute made for his protection.
2. **Contributory Negligence:** PERSONS WORKING IN COAL MINES: STATUTE. The act of the general assembly of March 23, 1881 (Law 1881, p. 165), providing for the health and safety of persons employed in coal mines, does not exempt any one so employed from the direct and immediate consequence of his own carelessness.
3. ——— : ——— : RIGHT OF ACTION. Where one so employed in a

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coal mine is injured and killed, his widow will have no right of action therefor, if the husband could not have maintained an action had death not ensued.

4. **Practice.** Where there is no dispute as to the facts, it is the duty of the court to apply the law thereto.
5. **Persons Employed in Coal Mines:** ACT OF MARCH 23, 1881, ACTION ON. In an action on said statute of March 23, 1881, for an injury to an employe in a coal mine, by reason of the neglect of the defendant to fence the entrance of the shaft, the only inquiry is whether the requirements of the statute were complied with, and if not, whether the injury complained of was occasioned thereby.

Appeal from Henry Circuit Court.—HON. JAMES B. GANTT, Judge.

AFFIRMED.

M. A. Fyke for appellant.

(1) The court erred in excluding the evidence offered by appellant to show the proper and prudent manner of fencing and protecting the top of the coal shaft.

(2) The demurrer to the evidence should not have been sustained, for the evidence clearly showed that the primary cause of the accident was the failure of the defendant to fence and cover, or protect, the top of the shaft as required by the act of the general assembly. Acts of 1881, p. 168, sec. 8; *Devlin v. Gallagher*, 6 Daly, 494; *Loewer v. City, etc.*, 77 Mo. 431; *Ry. v. Wyly*, 65 Ga. 120. By section six of said mining act it is provided that "any party or person neglecting or refusing to perform the duties required to be performed by sections four, five, six, seven and eight, shall be deemed guilty of a misdemeanor." So that defendant in this case, in failing to protect the top of its shaft, was guilty of a criminal offence, and is liable in a civil action for all damages arising from such criminal act. *Binford v. Johnson*, 22 American Law Register, 50; *Henry v.*

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Railroad Company, 50 Cal. 176. In *Weick v. Landes*, 75 Ill. 93, it is said: "Whoever does an unlawful act is to be regarded as the doer of all that follows." *Greenland v. Chaslin*, 5 Exch. 243. The mere fact that deceased may have known that the shaft was not protected, would not preclude a recovery, if he fell without any fault or negligence on his part. *Loewer v. City of Sedalia*, *supra*; *Buesching v. St. Louis Gas Co.*, 73 Mo. 220; *Pennsylvania Co. v. Frana*, S. C. Ill., Nov. 17, 1884. The presumption of law is that the deceased was in the exercise of ordinary care, and this presumption is not overthrown by the mere fact of injury. *Buesching v. St. Louis Gas Co.*, *supra*; *Sherman & Redfield on Negligence*, sec. 44; *Hoyt v. City of Hudson*, 46 Wis. 105. There was no evidence showing that deceased was negligent at the time he fell, and nothing from which negligence could be presumed, unless the fact that deceased knew that the top of the shaft was not protected, and could have seen it if he had looked, raises such presumption. Such facts do not raise a conclusive presumption of negligence in him, at all events, and the question of negligence should have been submitted to the jury. *Barton v. Railroad Co.*, 52 Mo. 253; *Fernandes v. Railroad Co.*, 52 Cal. 45.

B. G. Boone and James Carr for respondent.

(1) No cause of action was stated in the petition. It failed to state facts bringing it within the terms of the mining act. Besides there are no facts alleged from which a breach of duty to the deceased can be deduced. *Williams v. Hurgham, etc.*, 4 Pick. 341; *Bartlett v. Crozier*, 17 John. 456; *Wellon v. Ry.*, 34 Mo. 358; *Ry. v. Wilson*, 31 Ohio, 555. (2) Plaintiff's evidence shows that the negligence of the deceased was the proximate cause of his death, notwithstanding the failure of respondent to securely fence the top of the shaft into

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which he stepped and fell. *Reynolds v. Hinman*, 32 Ia. 146. The deceased knew the danger and voluntarily assumed the risk. *Powell v. Ry.*, 76 Mo. 80; *Lenix v. Ry.*, 76 Mo. 86. (3) The court properly sustained the respondent's demurrer to appellant's evidence. Cases last *supra*.

RAY, J.—This is an action begun by plaintiff against defendant for damages, on account of the death of her husband, Edward L. Spiva, which, as was admitted upon the trial, was caused by an injury received by him in falling down the shaft at defendant's coal mine, said Spiva being at the time in defendant's employ thereat. A demurrer to the evidence was sustained by the trial court, and the propriety of this ruling is the main question before us. The petition charged, among other things, that the cage was lowered to the bottom of the shaft without the knowledge of Spiva, upon the order of defendant's foreman, and contrary to the usual custom of defendant, while Spiva was dumping the coal from the box which had just been taken from the cage, and that, in attempting to put the coal box back onto the cage he stepped into the shaft. It is perhaps sufficient to say of this allegation that there is no evidence that the foreman gave any order whatever, or even that he was present, nor does it show what defendant's customary way of lowering said cage was, or that it was managed or lowered in any different way upon this occasion, through the direction or procurement of defendant or its other servants. The mere fact of his falling down the shaft is the only evidence to show that the cage was lowered to the bottom of the shaft without his knowledge.

The petition, however, is substantially grounded upon "an act providing for the health and safety of persons in coal mines, and providing for the inspection of the same." See Acts of 1881, p. 168. Section eight

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thereof, provides that: "The top of each and every shaft and the entrance to each and every immediate working vein shall be securely fenced by gates properly covering and protecting such shaft and entrance thereto." Section fourteen of same act provides: "For any injury to persons or property, occasioned by any wilful violations of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby; and, in case of loss of life, by reason of such wilful violation, or wilful failure, as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs, or adopted children." By section six of said mining act it is provided, that: "Any party or person, neglecting or refusing to perform the duties required to be performed by sections four, five, six, seven and eight, shall be deemed guilty of a misdemeanor."

The defendant had not complied with the above and foregoing provisions of the statute in regard to gates, and would be clearly liable for any injury occasioned thereby to one coming within its provisions, and in case of death the right of action would accrue under the statute to the widow of the person killed, his lineal heirs or adopted children. The evidence also shows, however, that Spiva was employed to work not *in* the coal mine, but on top of the ground and at the entrance to the shaft, and that he accepted such employment and remained engaged therein for sixteen months previous to the date of injury, with full knowledge of the condition of things. There were no gates there when he began work. The witness, Richard Bowen, was the pit boss at the time the accident happened, and was mine inspector for Henry county, at the date of the trial. With the exception of the plaintiff, who testified in her own behalf, and whose testimony was solely in relation to the marriage, and health, and earnings of her husband.

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Bowen was the only witness introduced at the trial. He said: "The top of the shaft was not covered at all. On the west side of the shaft there was a couple of doors to break off the wind; they were not put there as a fence or protection for the top of the shaft. On the east side there was nothing at all. * * * The top of the shaft was in the same condition at the time of the accident that it had been all the time for two years, and in the same condition it was in when Spiva first entered into the employment of the company. There had been no change."

Whatever danger may have been thus occasioned, by the absence of the gates, was not only open and obvious, but was actually known to said Spiva, and numerous authorities hold in such cases, that one who thus voluntarily assumes the risk, thereby waives the provisions of the statute enacted for his benefit. But we do not base the decision and result upon that ground, as the absence of the fences and gates did not, under the evidence, cause, or contribute to cause the injury. The statute gives the right of action for injuries *occasioned* by a wilful violation, or wilful failure to comply with its requirements. The mere co-presence and co-existence of the defendant's default, and an injury to the husband, with an entire absence of *causal* connection between them is not sufficient, for the law would regard the injury, not attributed by the evidence to the defendant's omission of duty as a procuring cause, as the result of accident or misfortune. In this case the proof is, we think, plain, that in the long, frequent and constant daily performance of his duties at the top of the shaft, and from his monotonous familiarity with them, Spiva was, when injured, discharging them in a mechanical fashion, without much conscious attention to what he was doing, or the condition of things around him at the time. If this inference does not logically and inevitably follow, then the most that can be said of plaintiff's evi-

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dence is that it leaves the resulting injury without any ascertained or explainable cause.

The witness, Bowen, further testified: "Spiva had been in the employ of the defendant a year or more, about fifteen or sixteen months. His duties were on top, to dump the coal and stock, and send down props, and whatever he might be called on to do. When the cage came to the top it was fastened by iron (fangs) which caught the cage, and had to be unloosed by the dumper before the cage could descend. When the cage came to the top of the shaft it filled in the entire top of the shaft, and could readily and easily be seen by any one looking to see it. A person working around the shaft could readily see, if he looked, whether the cage was lowered or not. If he looked he could see. There was nothing to prevent his seeing that the cage was lowered, if he had looked. The accident occurred in the daytime, in the afternoon about two or three o'clock." We thus see that when the cage came to the top, it fastened mechanically by iron fangs, but could not descend until these iron fangs were unloosed by Spiva, who was the dumper, and the cage was in this respect under his control. After the accident happened the cage was found at the bottom of the shaft, with Spiva lying upon it and the coal box lying upon him. There is no allegation or evidence that the iron fangs that secured the cage were defective, or were unfastened by any one else, and indeed no one is shown to have been present at the time except Spiva himself. The evidence shows nothing in the circumstance, time, place, or other conditions done or suffered by defendant, or otherwise occurring, to distract his attention, or to deceive or throw him off his guard. The evidence, we think, overcomes all presumptions of due care on Spiva's part, and makes his want thereof the proximate and direct cause of this distressing accident. The duties imposed by the statute were for the health and safety of those engaged in mining labor))

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and occupation, and entitled to its benefits, but it is not the intention of the act, or policy of the law, to exempt any from the direct and immediate consequence of his own carelessness. *Reynolds v. Hindman*, 32 Ia. 146; *Chicago Ry. v. Ward*, 61 Ill. 130; *Beaucoup Coal Co. v. Cooper*, 12 Brad. 373. The right of action accruing to the widow under the statute, is such as would have existed in the husband's favor if death had not ensued, and none other, and as we hold the husband could not, under the evidence, have maintained the action if he had survived the accident, a recovery must be denied plaintiff upon the same ground. There being then no dispute as to the facts in the case, it was the court's duty to apply the law to the undisputed facts, and its action in so doing in this case was, we think, entirely proper. The case of *Buesching v. The St. Louis Gas Light Company*, 73 Mo. 219, and other cases cited by appellant, are unlike the one before us in essential features, and are, therefore, inapplicable and without value as authority in this case.

There is one further matter, urgently presented by appellant, which we will notice briefly. Upon the trial the court sustained objections to the following questions asked the witness by plaintiff's attorney: "What, in your judgment as an experienced miner, is a safe and prudent manner of protecting or covering the top of a shaft?" "Was the top of the shaft at the time of defendant covered or protected in a safe and prudent manner?" The act in question is a legislative determination, to the extent of its provisions, of the matter contained in the questions, and in any action thereon, the only proper inquiry is whether its requirements have been, in that respect, complied with, and if not, whether the injury complained of was thereby occasioned. In this case there is no pretense that the fencing gates had been provided, and upon this branch of the evidence plaintiff's case was complete, and the proof offered, if com-

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petent, and received could have added nothing. In any view of the case its exclusion was without prejudice. Finding no error in the record, we affirm the judgment. All concur.

JACKSON *et al.* v. WOOD, *Appellant*.

1. **Deed: CANCELLATION OF FOR FRAUD: EVIDENCE.** When a grantor in a deed of land seeks its cancellation and the reinvestiture of title on the ground of fraud or mistake, the *onus* of establishing the same is on such grantor, and before the relief asked for will be given, the fraud or mistake must be established by clear and convincing evidence.
2. **The evidence** in this case reviewed and held, reversing the judgment of the lower court, that the plaintiff failed to make out her case as required by the above rule.

Appeal from Vernon Circuit Court.—HON. J. D. PARKINSON, Judge.

REVERSED.

Scott & Stone and G. S. Hoss for appellant.

The respondent's case depends on her own unsupported testimony, and fails to meet the requirements of the rule in cases like this, that the proof should be "so clear, definite and positive as to leave no room or reasonable ground for hesitancy in the mind of the chancellor," as to the truth of respondent's statements before the decree asked by her should be granted. *Forrester v. Scoville*, 51 Mo. 268; *Johnson v. Quarles*, 46 Mo. 423.

E. E. Kimball and E. J. Smith for respondents.

The finding and judgment were for the right party.

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McCormick v. Miller, 102 Ill. 208. This court should not disturb the finding of the trial court. *Faust v. Bemmer*, 30 Mo. 414; *Garvin v. Williams*, 44 Mo. 465; *Street v. Gass*, 62 Mo. 226.

NORTON, J.—This suit was instituted in the circuit court of Vernon county to set aside and cancel a deed executed in 1876 by plaintiff, Rhoda C. Wood (now Rhoda Jackson), conveying to Austin C. Wood certain land in the petition described. The circuit court rendered a decree according to the prayer of the petition, cancelled the deed, and invested the title in plaintiff, subject to a mortgage which had been put upon the land by said Wood to secure the payment of five hundred dollars. From this decree the defendant has appealed to this court and seeks to reverse it on the ground that it is not supported by the evidence. Since the appeal to this court the death of defendant was suggested and the cause revived in the name of his heirs.

The petition charges in substance that plaintiff Jack, son was the wife of Gallatin A. Wood, who died in January, 1874, the owner in fee of the land in controversy which was his homestead; that after his death she continued to reside on the land till some time in 1878, when she married her co-plaintiff Jackson; that A. C. Wood, who was a son of said Gallatin A. Wood by a former marriage, took charge of matters connected with the farm after his father's death; that confidential relations existed between plaintiff and defendant; that defendant always represented to her that she was only entitled to one-third of the land; that she was illiterate and unable to read or write; that in August, 1876, relying on defendant's representations as to the value and quantity of her interest, she accepted an offer of two hundred and thirty dollars for her interest in the land; that defendant brought a deed for her to be signed, and pretended to read the same to her as conveying one-third interest

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therein, whereas, in truth and in fact, the said deed conveyed to said Wood an absolute fee-simple estate in all the land, and that she was induced to execute the same by the false and fraudulent representations of defendant; that she only owned an interest of one-third, when in fact she had an absolute title to the whole, and that the land was worth fourteen hundred dollars. The answer, besides being a general denial, set up that at the time of defendant's purchase, plaintiff had full knowledge of her title, and that in addition to the price paid, it was agreed that plaintiff and her child should have a home with him as long as she chose to remain.

When the grantor in a deed seeks its cancellation and a reinvestiture of title on the ground of fraud or mistake, the *onus* of establishing the fraud is upon him or her, and before relief can be granted the fraud or mistake must be established by clear and convincing evidence. This class of cases is analogous to that class where a resulting trust is sought to be established by parol evidence, in which, in the cases of *Johnson v. Quarles*, 46 Mo. 423, and *Forrester v. Scoville*, 51 Mo. 268, the rule is laid down that to warrant a decree the evidence must be so clear, definite and positive as to leave no reasonable ground for doubt. The security of titles and the temptations to perjury when they are sought to be overturned by parol testimony by the party making the deed, necessitates a rule requiring such party to make out his case by a clear preponderance of evidence. This, we think, has not been done in this case. Plaintiff, who was introduced on her own behalf, is the only witness who testified to the facts alleged in the petition, and her testimony is flatly contradicted by that of Austin Wood and John Wood, both of whom swore that the plaintiff was fully informed that she was the absolute owner of the land, and that the deed was read correctly and as it was written, before she signed and acknowledged it. Their evidence as to her knowledge of her right to the land was

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corroborated by that of Mr. Starks, another witness who testified that some time anterior to the sale, he had a conversation with plaintiff, who said she was talking about selling out, and was to get somewhere from two hundred to two hundred and fifty dollars, and that he told her that under the law she was entitled to fifteen hundred dollars of real estate absolutely, and that would cover the whole place. She said if she did not sell out she would leave the place.

Greer and his wife both testified to a conversation had with plaintiff in the latter part of the summer or fall of 1876 in which she claimed to be the absolute owner of the land. The character of Greer was impeached by three witnesses and sustained by three. Besides this, plaintiff testified that the deed was acknowledged before Mr. Ely, a justice of the peace, who started to read the deed to her and that defendant stopped him, saying that he had read the deed to her, and that he said not to read it to her again. In this she is contradicted by the justice, who states in his evidence, that he asked if he should read the deed, and Austin said "he had read it to her, but you can read it again if she wishes to hear it;" that defendant was willing for him to read it. She also testified that John Wood did not go with them to the justice's when the deed was acknowledged, and that no one was present but Austin and John Wood, and Mrs. Ely. In this she is contradicted by Ely, Austin and John Wood. The preponderance of the evidence is on the side of defendant instead of plaintiff, and under the rule indicated in the outset of this opinion the decree cannot be permitted to prevail. Judgment reversed, in which all concur.

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BLACKBURN *et al.*, Appellants, v. BOLAN.

Sale of Lands of Minor: JURISDICTION. Under the revision of 1845 (R. S., 1845, chap. 73, sec. 23) the county court did not have jurisdiction to order the sale of the land of a minor for the purpose of his support and maintenance, but only for the purpose of procuring and completing the education of such minor.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

The bill of exceptions in this case recites: "Plaintiffs offered as the foundation of their title, the petition of Wm. Mockbee, curator of Charles Bramble, a minor, to the county court of St. Charles county, for the sale of the lands of said minor, including said lot in suit, the order of sale made by said court on December 16, 1853, the report of sale by said curator, approved by said court on March 14, 1854, and the deed made in pursuance of said sale by said curator to Samuel Overall, which evidence was objected to by defendant upon the ground that the said county court had no jurisdiction in the premises, and that the order of sale and all proceedings under it were absolutely null and void, and that the deed conveyed no title to the said lot—which objection was sustained by the court and said evidence excluded."

C. Daudt for appellants.

(1) The petition of the curator alleged that "the boy will hereafter require schooling also." The county court found the averment, that the boy needed schooling, sufficient to assume jurisdiction, and however erroneous its judgment may have been, it cannot be attacked in the collateral proceeding. *Strouse v. Drennan*, 41

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Mo. 293. (2) The former decisions holding that an administrator or guardian sale approved at the same term when made, was an absolute nullity have been expressly overruled by the Supreme Court in *Murry v. Purdy*, 66 Mo. 606; *Johnson v. Beazley*, 65 Mo. 253; *Sims v. Gray*, 66 Mo. 614; *Wilkeson v. Allen*, 67 Mo. 503. (3) Although Charles Bramble resided without this state, the county court had jurisdiction to appoint a curator. Acts 1849, p. 55.

Theodore Bruere and *F. W. Hinman* for respondent.

(1) That neither a court of law, or of equity, has any inherent original jurisdiction to order the sale of the real estate of a minor, but that such jurisdiction rests entirely on the statutory law, has long been the settled doctrine in this country and in England. The court has no right to entertain a question of sale of such lands, independently of an authority from the legislature. Tyler on Infancy and Coverture, sec. 193, p. 296; *Garnstone v. Gaunt*, 1 Collyer, 577; *Rogers v. Dill*, 6 Hill (N. Y.) 415, 417; *Onderdonk v. Mott*, 34 Barb. 106. (2) The curator had no control over the support, maintenance, or education of his ward; his duties were confined to the care and management of his real estate, and he was not qualified to petition for the sale of real estate. (3) The statute only empowers the court to sell the real estate of the ward to "raise funds necessary to complete the education of the minor." The court's action in ordering the sale for the support and maintenance of the minor was *coram non judice*. *Bonaparte v. Lucas*, 21 Mo. 598; *Farrar v. Dean*, 24 Mo. 16; *Beal v. Harmon*, 33 Mo. 436; *Newcomb v. Smith*, 5 Ohio, 448.

SHERWOOD, J.—Action of ejectment to recover possession of lot 13, block 5, of St. Charles commons. The
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circuit court did right in rejecting, when offered in evidence, the deed of the curator to Samuel Overall, the purchaser at the sale, and in rejecting, also, the record of the prior proceedings in the county court, which resulted in that deed being executed. Under the law as it stood at the time of the proceedings in question, the county court had no jurisdiction to order the sale of the land of a minor for the purpose of the support and maintenance of such minor, but only for the purpose of procuring and completing the education of such minor. *Beal v. Harmon*, 38 Mo. 436; *Strouse v. Dreannan*, 41 Mo. 289.

The judgment of the court of appeals, affirming that of the circuit court, is, therefore, affirmed. All concur.

BISER, *Appellant*, v. DAMERON.

The evidence in this case examined and the action of the trial court approved, in dismissing plaintiff's bill, which sought to compel defendant to convey to a corporation formed to buy in lands at tax sales, lands alleged to have been bought for the corporation.

Appeal from Shannon Circuit Court.—HON. J. R. WOODSIDE, Judge.

AFFIRMED.

A. & J. F. Lee for appellant.

Seay & Woodside for respondent.

BLACK, J.—The plaintiff brings this suit making the Shannon Land and Stock Growers' Association, and the stockholders thereof, other than himself, defendants.

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The purpose of the suit is to require the defendant, Logan D. Dameron, to convey to the corporation some one hundred thousand acres of land in Shannon county. In 1880, the plaintiff, Biser, and Dameron, entered into a scheme having in view the purchase of lands in that county, under tax judgments to be obtained under the tax law of 1877. Dameron was to furnish the money and Biser was to do the work. The latter claims that he was to have a fourth of all the lands so purchased, and the former that Biser was to have only a fourth of the profits. At all events, after the parties had made their negotiations, at St. Louis, Biser made contracts with the officers in Shannon county, that is to say, with a justice of the peace, the constable, attorney for the collection of taxes, clerk of the circuit court, and sheriff, by which they sold their fees, thereafter to be earned, at a considerable discount. The publisher in like manner sold his fees for publication and notice of sale, for two dollars in each case, when the taxable costs therefor were about thirty dollars, the purchasers, however, agreed to deliver to the publisher the necessary orders of publication and notices of sale printed in form suitable as a supplement to the publisher's newspaper. These agreements were then assigned to Dameron. Pursuant to the agreements, some four hundred and fifty suits were brought before the justice of the peace and prosecuted to judgment and a sale of the lands. These fees amounted to some six thousand dollars, were paid by Dameron, and the lands, aggregating one hundred thousand acres, were purchased in the name of the Shannon Land and Stock Growers' Association, in November, 1880, at the amount of the taxable costs in the respective cases, so that not a cent of revenue was raised from the sale of this vast body of lands. Biser and Dameron had, just previous to the last mentioned date, organized this corporation as a medium through which these transactions might be completed. These contracts, with the officers and the publisher, pro-

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vided for four or five hundred suits with a stipulation that the number might be increased to one thousand if the purchasers desired. Besides these suits before the justice, the officers subsequently commenced some four hundred more suits in the circuit court, which were prosecuted to judgment and sale, and the lands again, aggregating one hundred thousand acres, were sold, and Dameron purchased all of them in his own name, in no case paying more than the taxable costs. These second sales occurred in 1881 and 1882, and are known as the May sales of 1881, and the lands then purchased are those here in question. The plaintiff contends that Dameron purchased these lands under the optional provision of the contracts with the officers and publishers, and with the means of the corporation.

The testimony of Biser and Dameron is contradictory on many material questions, as indeed might be expected, considering the character of the transactions in which they were engaged. It is quite clear that the capital stock of the corporation was twelve thousand dollars, one-half paid up; that Dameron furnished this six thousand dollars, and that it was consumed in the purchase of the first batch of fees. There is no satisfactory evidence that the money used in making the purchases at the second sales was the money of the corporation; on the contrary, we can come to no other conclusion than this, that the money was furnished by Dameron, and that he purchased for himself, and on his own account. It would seem Dameron declined to furnish money to purchase any more fees after the first batch, but in a conversation with Biser expressed a willingness to purchase the printer's fees for the second lot of suits on his own account, and did so do in August, 1880. Biser then had authority from the publisher to sell his fees, or rather his right to make the publications and notices of sale, though Dameron negotiated with the publisher direct, and not through Biser. The evidence of the officers

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shows that they regarded the contracts as exhausted by the first lot of suits. The second lot of suits were brought on their own motion, Biser and Dameron having failed to avail themselves of the option. Indeed, it is pretty conclusively shown that Biser himself took a second contract from the officers for the sale of their fees, and was endeavoring to negotiate this contract, but failed so to do. Nothing was done with respect to the fees of the officers, as to the second lot of suits, until the first day on which the lands embraced therein were sold, when Dameron made an arrangement with them, paying one dollar more in each case than had been paid for the first lot. The fact that Dameron put these lands out of his hands, though he says not to avoid any claim of the corporation or Biser, and no protection is now claimed on that ground, is still a circumstance against him. The evidence, as a whole, and there is much of it, tends strongly to show that neither Biser nor the corporation had any right to or claims upon these lands, purchased at the second sales. The circuit court seems to have so found, and dismissed the bill, and we see no reason why that judgment dismissing the bill should be disturbed.

It may be added that the parties on both sides of this suit, by their pleadings and in the argument at the bar of this court, have assumed and presented the case upon the theory that the transactions resulting in the sale and purchase of the lands were entirely legitimate. We are not to be understood as giving any sanction or acquiescence to that assumption or theory of those transactions.

Affirmed. All concur.

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TAYLOR, *Plaintiff in Error*, v. THOMPSON.

Trusts: EQUITY: DEED. T, a married woman joined, with her husband in a deed of her land to one W—the conveyance being made in the absence of the grantee and without consulting him and without any consideration therefor. It did not appear from the evidence that the land was her separate estate or that the conveyance was made in trust for T, or that she ever informed W that he was to so hold it in trust. W subsequently sold the land, informing his grantee that the latter could safely purchase from him; *held* that a court of equity would not regard W's grantee as a trustee for T.

Error to St. Louis Court of Appeals.

AFFIRMED.

M. F. Taylor for plaintiff in error.

(1) There was a constructive trust in Wolf in favor of Mrs. Taylor. Where the legal estate in land is conveyed to a stranger without consideration there arises a trust for the owner. 2 Story Eq. 1,014; 1 Cruise Dig, Tit. 12, ch. 1, p. 52; Hill on Trustees, Am. notes, p. 170; 2 J. and W. 565-73; 1 Story Eq. 383, 395; Tiff & Bull on Tr., 22-23; *Grove's Heirs v. Falsome et al.*, 16 Mo. 543; Hill on Trusts, 92 side page and note. (2) One who takes property with trust, with notice of the trust charge, is bound by the trust. Hill on Trusts, 164; *Mead v. Orrey*, 3 Atk. 238; *Earl Brook v. Buckley*, 2 Ves. 498; *Taylor v. Stiffert*, 2 Ves. Jun. 437; *Crofton v. Ownsly*, 2 Sch. and Lef. 262; *Adair v. Shaw*, 1 Sch. & Lef. 262; *McLaurine v. Monroe*, 30 Mo. 462; *Truesdale v. Callaway*, 6 Mo. 605; *Thompson v. Rencure*, 12 Mo. 157; *Paul v. Chouteau*, 14 Mo. 580. (3) And this is so whether the trust arises upon the face of the instrument or by implication of law. *Martin v. Bk. Ala.*, 31 Ala. 115; *Moliney v. Kernan*, 2 D. & W. 31; *Butcher v.*

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Stapleton, 1 Vern. 363. (4) Thompson had knowledge of sufficient facts to charge him with notice of the equity. 1 Story's Eq. sec. 399; *Speck v. Riggin*, 40 Mo. 405; *Beattie v. Butler*, 21 Mo. 328; *Vaughan v. Tracey*, 22 Mo. 418; *Foster v. Brashears*, 55 Mo. 22; *Fellows v. Wise*, 55 Mo. 413; *Muldrow v. Robinson*, 58 Mo. 507; *Majors v. Buckley*, 51 Mo. 231.

Glover & Shepley, G. H. Shields and A. R. Taylor for defendant in error.

(1) The evidence of the plaintiff shows a conveyance of the property in controversy to the defendant in fee-simple absolute, and utterly fails to show that he took it or holds it in trust or for any one than himself. Nor does the evidence show that defendant knew or had reason to suspect that Wolf held the property for the plaintiff if such was the case. (2) There being no evidence to sustain the case set out in the petition, the court properly gave the instructions asked by defendant, that upon the case as made the plaintiff was not entitled to recover. (3) There was no error in the rejection or admission of testimony that plaintiff can complain of.

HENRY, C. J.—Mrs. Taylor, a married woman, was the owner of certain lots of ground in the city of St. Louis. She joined with her husband in a deed conveying them to M. A. Wolf, who paid nothing for them and had no knowledge of the conveyance until he returned from the east, the conveyance having been made in his absence. The defendant, Thompson, wishing to purchase them of the husband of Mrs. Taylor, learning that the legal title was in Wolf, went to Wolf and asked him if he had any claim against the land, and was informed that he had not, and would convey them to any one whom Mr. Taylor would designate; and thereupon Thompson purchased the lots and received a deed for them from Wolf.

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It does not appear that the property was held by Mrs. Taylor as separate property. She alleges that the lots were conveyed to Wolf to be by him held in trust for her, but she failed to prove this allegation, and the fact that the conveyance was made to Wolf in his absence and without consulting him is beyond controversy. Nor does it appear that he was ever informed that he was to hold the lot in trust for her. The record showed the title in Wolf, who informed the purchaser, Thompson, that he might safely purchase, and we find no fact in this record which would warrant a court of equity in holding Thompson as a trustee for Mrs. Taylor. He paid about twenty-five hundred dollars for the lots, and whether it was considerably less than the property was worth is not a matter for consideration, in the absence of all other testimony tending to charge him with any notice that the property was held by Wolf in trust for Mrs. Taylor. So the court of appeals held and its judgment is affirmed. All concur.

THE STATE V. PATTERSON, *Appellant*.

1. **Criminal Law : CONSTITUTION : FORMER JEOPARDY.** Where a defendant who has been convicted of a criminal offence asks and obtains a new trial, he may again be put on trial upon the same facts before charged against him, and the proceedings had on the first trial will constitute no protection on the second one.
2. **Criminal Practice : DEFENDANT TESTIFYING, CROSS-EXAMINATION OF.** A defendant testifying as a witness on a criminal trial should not be cross-examined by the state as to matters not testified to by him in chief.
3. ——— : **SEDUCTION OF FEMALE UNDER PROMISE OF MARRIAGE : PRIOR ACTS OF UNCHASTITY OF PROSECUTRIX.** On the trial of an indictment, under Revised Statutes, section 1259, for seducing a female

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under promise of marriage, it is competent for the defendant to show that prior to the time of the alleged seduction, the prosecutrix was guilty of acts of lewdness and unchastity with other men than the defendant. (Overruling *The State v. Brassfield*, 81 Mo. 151).

Appeal from Livingston Circuit Court.—HON. J. M. DAVIS, Judge.

REVERSED.

Broadbush & Wait for appellant.

(1) The court erred in sustaining the state's demurrer to the plea of once in jeopardy. *Flagg v. People*, 40 Mich. 706; *Gordon's case*, 40 Mich. 716; *State v. Moon*, 41 Wis. 684; *State v. Moore*, 66 Mo. 372; *Shepherd v. People*, 25 N. Y. 406. (2) The court erred in permitting the state to cross-examine defendant as to his having fled to avoid arrest, it not being a matter testified to by him in chief. *State v. Porter*, 75 Mo. 171; *State v. Turner*, 76 Mo. 351; *State v. McGraw*, 74 Mo. 573; *State v. McLaughlin*, 76 Mo. 324; *State v. Douglass*, 81 Mo. 231. (3) The court erred in giving the state's first instruction. The prosecuting witness must surrender her chastity by reason of the promise of marriage, relying on that and nothing else. *People v. Clark*, 33 Mich. 112; *State v. Wilson*, 58 Ga. 9. (4) Mrs. Lee should not have been permitted to testify as to a promise of marriage made in October, 1881, which was seventeen months after the alleged seduction. (5) The court erred in refusing defendant's proof of prior acts of unchastity of Sarah Loe with other persons than the defendant. *People v. Bowen*, 26 Ohio St.

B. G. Boone, Attorney General, for the state.

(1) The plea of once in jeopardy was not well taken in this case. 1 Whar. Crim. Law (5 Ed.) sec. 591; *State*

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v. Hays, 78 Mo. 605 ; Const. of Mo., art. 2, sec. 23 ; *State v. Blaisdell*, 59 N. H. 328 ; *State v. Sherburne*, 58 N. H. 535 ; *State v. Rust*, 31 Kan. 509. (2) Evidence of previous specific acts of unchastity on the part of the prosecutrix was inadmissible. R. S., sec. 1259 ; *State v. Brassfield*, 81 Mo. 151 ; *Bowers v. State*, 29 Ohio St. 542. (3) The instructions given by the court properly declared the law of the case, while those asked by defendant and refused were properly refused.

SHERWOOD, J.—The defendant was indicted under section 1259, Revised Statutes, for the seduction of Sarah Loe, and on trial had was convicted and his punishment assessed at two years in the penitentiary. He had been previously tried on the same indictment and found guilty, and his punishment assessed at a fine of four hundred dollars and one day's imprisonment in the county jail, but on his motion for a new trial this verdict was set aside on the ground of the insufficiency of the evidence; and on the second trial he interposed the plea of once in jeopardy, to which the state demurred and the plea was held bad.

I. There was no error committed touching this plea. Section twenty-three, article two, of our Bill of Rights does not embrace a case of this kind. If a person be acquitted by a jury he could not again for the same offence be placed upon trial ; for this would be to put him "in jeopardy" within the direct terms of the constitution; but where, as here, the defendant moved for a new trial, he "may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection." Cooley's Const. Lim. 327-8; *State v. Hayes*, 78 Mo. 600.

II. It was error to permit the state to cross-examine the defendant as to matters not testified to by him in chief. The statute on this point (sec. 1918) is very plain and the rulings of this court on the point have been so

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frequent that it would seem that a very little attention on the part of trial courts would prevent the necessity of our ruling the point any more. *State v. Porter*, 75 Mo. 171; *State v. McGraw*, 74 Mo. 573; *State v. Turner*, 76 Mo. 351; *State v. McLaughlin*, Id. 324; *State v. Douglass*, 81 Mo. 231.

III. A more important point is now to be discussed; it is this: whether the defendant should have been permitted to show that prior to the time the alleged seduction took place, which, it seems, was in May, 1880, the prosecutrix had been guilty of acts of lewdness and unchastity with other men than the defendant. In cases of *rape* the point of the admissibility of evidence of specific acts of unchastity on the part of the prosecutrix, occurring with other men prior to the one charged in the indictment, has not met with a uniformity of ruling. I here collate some of the authorities which deny the admissibility of such evidence: *Rex v. Hodgson*, Russ. & Ry. Cr. Cas. 211; *Rex v. Clark*, 2 Stark. Rep. 241; *Reg. v. Holmes*, 12 Cox C. C. 137; *Pleasant v. State*, 15 Ark. 624; *State v. Jefferson*, 6 Ired. 305; *State v. Forshner*, 43 N. H. 89; *State v. Knapp*, 45 Ib. 148; *People v. Jackson*, 3 Parker C. R. 391. Affirming the admissibility of such evidence, among others, are: *Rex v. Barker*, 3 Carr. & P. 589; *Rex v. Martin*, 6 Ib. 562; *Reg. v. Robins*, 2 Mood. & R. 14; *People v. Abbott*, 19 Wend. 192; *State v. Benson*, 6 Cal. 221; *State v. Johnson*, 28 Vt. 512; *State v. Reed*, 39 Vt. 417; *State v. Murray*, 63 N. C. 31; *Sherwin v. People*, 69 Ill. 55; *Strang v. People*, 24 Mich. 1.

The opinion of Judge Cowen in *People v. Abbott*, *supra*, which affirms the admissibility of evidence of particular acts of unchastity in cases of rape, is a very able one, reviewing the authorities then extant on the subject. That case has been criticised, but it has been frequently followed, and the ideas it embodies are fast gaining ground, as shown by some of the recent citations

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I have made. The reasoning of that case I have never seen answered, nor do I believe it can be. I have cited it, as well as others of like sort, because believing that authorities which recognize the rule in cases of that character sanction similar evidence in cases like the one under discussion. In short, that wherever by the nature of the proceeding, or the character of the prosecution, the chastity of the prosecutrix is brought into question any evidence which tends to impeach her chastity; to render it less probable that she was ravished in the one case or seduced and debauched in the other, is competent and relevant, whether consisting of evidence of her general reputation or of evidence of specific acts of lewdness or unchastity. And authorities are not wanting in support of this position, when the prosecution is for the offence with which the defendant in this instance stands charged.

The language of section 1259, *supra*, so far as pertinent here, is: "If any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute," etc.; and "In trials for seduction under promise of marriage the evidence of the woman as to such promise must be corroborated to the same extent required of the principal witness in perjury." Sec. 1912. In Michigan, the statute in relation to seduction reads: "If any man shall seduce and debauch any unmarried woman he shall be punished," etc. And in that state it has been ruled under that statute, that the chastity of the prosecutrix, previous to the alleged offence, is in all cases involved, and that evidence, even elicited from her own cross-examination is competent to prove illicit connection with another man. *People v. Clark*, 33 Mich. 112. Marston, J., in that case remarking: "Illicit intercourse alone would not constitute the offence charged. In addition to this, the complainant relying on some sufficient promise or inducement and without which she would not have yielded, must have been drawn aside

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from the path of virtue she was honestly pursuing at the time the offence charged was committed. * * *

The object of this statute was not to punish *illicit cohabitation*. Its object was to punish the seducer, who, by his arts and persuasions, prevails over the chastity of an unmarried woman, and who thus draws her aside from the path of duty and rectitude she was pursuing. If, however, she had already fallen and was not at the time pursuing this path, but willingly submitted to his embraces as opportunity offered, the mere fact of a promise made at the time would not make the act seduction. Nor will intercourse which takes place in consequence of and reliance upon a promise made, make the act seduction. If this were so, then the common prostitute, who is willing to sell her person to any man, might afterwards make the act seduction by proving that she yielded, relying upon the promise of compensation made her by the man, and without which she would not have submitted to his embraces. Illicit intercourse, in reliance on a promise made, is not sufficient, therefore, to make the act seduction.

"The nature of the promise, and the previous character of the woman as to chastity, must be considered. In most of the states, their statute makes the seduction of a woman of 'previous chaste character' an indictable offence, while there are no such words, nor any of like import in ours, and the courts have held that the words, 'previous chaste character,' mean that she shall possess actual personal virtue, in distinction from a good reputation, and that a single act of illicit connection may, therefore, be shown on behalf of defendant. If, however, we are correct in what we have already said upon the question as to what is necessary to make an act of illicit intercourse, seduction, then the chastity of the female, at the time of the alleged act, *is in all cases involved*, and the presumption of law being in favor of chastity, the defence have a right to show the contrary.

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This, upon principle, then, we consider the correct doctrine, and that it necessarily follows from what we have said upon the other question."

In another case in that state, testimony of other men was held competent to show that they had illicit sexual acts with the prosecutrix prior to the time of the alleged seduction; provided there was no unwillingness on their part to testify. *People v. Brewer*, 27 Mich. 134. The statute on this subject in Pennsylvania very closely resembles ours: "The seduction of any female of good repute under twenty-one years of age with illicit connection, under promise of marriage," etc. Under that statute it has been ruled that to constitute the offence therein mentioned, there must be illicit connection, and the female must be drawn aside from the path of virtue which she was honestly pursuing. *Commonwealth v. McCarty*, 2 Clark, 135. Lewis, P. J., in that case said: "To constitute the offence * * * several ingredients are requisite. Of these, in their order: 1. Seduction. This is to corrupt, to deceive, to draw aside from the right path. Every illicit connection is not seduction. It cannot be said that she was drawn aside from the path of virtue unless she was honestly pursuing that path when the defendant approached her. If she was vile and corrupt, at the time, and submitted herself to improper practices from her own lustful propensities, and without any arts of his, he is not her seducer. If Joseph had submitted to the solicitations of Potiphar's wife, although he might have been guilty, with her, of the crime of adultery, he could not have been justly charged with that of seduction. * * * But the unrepenting and unreformed prostitute is not a being upon whom this offence can be committed, and is not the object intended to be protected by the provisions of this act of assembly. In the process of seduction the affections of the female are gained, her mind and morals polluted, lewd thoughts are inculcated, but in order to

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complete the offence, under the act of assembly, it is necessary that there should be illicit connection. This is the final consummation of the crime which brings it under the cognizance of human law. * * * It is necessary that the female should be of 'good repute.' It is possible for a female to enjoy a good reputation without deserving it, and it is often the case that a bad reputation is acquired by imprudent behavior not amounting to positive crime. In the first case it has already been shown that one of dishonest disposition, ever ready to yield to the solicitations of vice, is not a person upon whom this offence can be committed. In the latter case it is not material in the consideration of this question whether she acquires a bad reputation by imprudence or by crime. * * * It is seduction 'under promise of marriage' which is made indictable by this act of assembly. It must appear to the satisfaction of the jury that the seduction was accomplished by means of a promise of marriage. Seduction by any other means does not fall within the condemnation of the act."

These remarks I regard as an admirable analysis, not only of the statute of Pennsylvania, but also of our own statute.

Our statute is worded a little differently, but in substance and effect is the same and possesses the same essential elements. Now, if it be true, as is clearly deducible from the foregoing authorities, that the word, "seduce," *ex vi termini*, implies *chastity* as a *condition precedent* on which the act of seduction is to operate, resulting in the end in debauchment, the *physical* deprivation of chastity as the consummation of the crime, against which our statute is leveled, I am unable to discern any material difference between that statute and those of other states, where the language is: "Any man who shall, under promise of marriage, seduce and have illicit connection with any unmarried female of previous

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chaste character," etc. Stat. of N. Y. "If any person seduce and debauch any unmarried woman of previously chaste character," etc. Stat. of Iowa. For I do not see how the words, "previous chaste character," are specially significant, if full force be given to the word, "*seduce*," which bears with it in this instance as its own intrinsic and inseparable meaning the idea of *destroyed chastity*. "The word, '*seduce*,' though a general term, and having a variety of meanings, according to the subject to which it is applied, has, when it is used with reference to the conduct of a man towards a female, a precise and determinate signification, and is universally understood to mean an enticement of her on his part to the surrender of her chastity by means of some art, influence, promise or deception calculated to accomplish that object, and to include the yielding of her person to him, as much as if it was expressly stated." *State v. Bierce*, 27 Conn. 319; *Dinkey v. Commonwealth*, 17 Pa. St. 126. *How can that be destroyed by the seducer's insidious wiles and arts which at the time of its supposed destruction had no existence?* Any evidence, therefore, which shows, or materially tends to show that there was, at the time the alleged offence is charged to have been committed, *no chastity*, in the given case cannot be otherwise than competent and relevant. How better can you establish this fact than by specific acts of unchastity? Is it not the highest and best evidence of the fact in issue, and will not one of the most hackneyed rules of evidence apply as well here as in innumerable other cases of daily occurrence? Evidence of prior specific acts of unchastity with the *defendant himself* is now universally received, as well in cases of seduction as in cases of rape. What for? To show that in the latter class of cases there was less likelihood of absence of consent; and that in the former, in consequence of a prior act of the defendant, *there was no chastity left to seduce*. Can it be material by whom the prior act be performed,

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whether by the defendant, or whether by any one else? *Is it any the less seduction because Jones is the seducer instead of the defendant, Smith?* If in any civil or criminal trial where Smith is defendant I offer evidence showing a prior specific act of Jones which rendered the subsequent act of defendant, Smith, morally as well as physically *impossible*, will any court in christendom reject the proffered evidence?

But it is said by some of the authorities in cases of rape and seduction, the prosecutrix comes prepared to defend her *general reputation* for chastity, but not prepared to defend against charges of prior particular acts. Why, then, admit evidence of such acts with the defendant himself? Is the prosecutrix any the better prepared against evidence of such acts on his part than on the part of others? Does she not, by coming on the witness stand, declare her chastity, assert that at the time of the alleged offence she was possessed of that of which the defendant deprived her, and thus committed the offence? Is it not "*the gravamen*" of the state's complaint that a pure and chaste female has been rendered impure and unchaste by the seduction and illicit connection of the defendant? *West v. State*, 1 Wis. 209. This being so, is it not illogical in the extreme to admit evidence of particular acts on the part of A, going to show the moral and physical impossibility of a crime having been committed, and yet deny and repudiate evidence of a similar import on the part of B? Where, in all the annals and precedents of jurisprudence, can similar instances of inconsistency be found? But whether the prosecutrix be better prepared, on the score of her general reputation for chastity, than on the score of particular acts, should not be allowed to prejudice a defendant's cause and sacrifice his life or his liberty, on the altar of an absurd technicality. In *Shirwin v. People*, 69 Ill. 55, where the prosecution was for *rape*, and the

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question was whether evidence was admissible as to prior sexual acts with other men, it was ruled admissible, and it was there said: "*The right of the accused to defend must be as broad as that of the prosecution to criminate.*"

If I have been correct as to what is meant by our statute, as to what is necessarily implied by the words, "*seduce and debauch*"—and in this, I think the authorities I have cited, as well as sound reason, fully support me—if *chastity* is the *sine qua non* of the offence of *seduction*, then the authorities in the states of New York and Iowa, whose statutes I have quoted, abundantly uphold the position, that in cases like the present you may show in defence that prior to the offence charged the prosecutrix was guilty with other men. *State v. Sutherland*, 30 Iowa, 570; *State v. Shean*, 32 Ib. 88; *Kenyon v. People*, 26 N. Y. 203.

I am further supported in the position taken by adjudications in the state of Georgia. Thus, in *Wood v. State*, 48 Ga. 192, and *Mann v. State*, 34 Ga. 1, where the statute reads: "Any person, who, by persuasion and promise of marriage, or by other false and fraudulent means, shall seduce a virtuous unmarried female," etc., and it was there held admissible, in prosecutions under that statute, to introduce in defence evidence which fell short of actual sexual guilt, but showed that the prosecutrix was corrupt in morals and unchaste in mind prior to the offence charged, and, therefore, could not have been seduced, corrupted or drawn aside from the path of virtue. If the deductions I have made from the statute, when reasoning upon it and the authorities cited, be not the correct one, then, as no corroborating evidence except as to the *promise of marriage* is required, it will be in the power of some designing woman of "*good repute*," one who has never worn the "*scarlet letter*," though in habit and at heart a harlot, to inveigle, by her fascinations, any one into a promise of

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marriage in the presence or hearing of some convenient witness, and then by her own unaided, uncorroborated oath, prove the *falsehood* of seduction, and then give him the wretched alternative of wedlock with her in all her vileness, or else the fate and infamy of a felon! I cannot believe that the legislative protection, intended only for the *pure and innocent* in heart, was designed to be extended over those who, being vile and impure, *have nothing left for the law to guard*.

I must, therefore, hesitate very long before accepting any other conclusion than the one already announced. And in view of our stringent statutory provisions, and of the ease with which the *mere fact of seduction* can be established, the admonition of Lord Hale in respect of another sexual offence, is equally applicable to the crime under discussion. Indeed, there are many circumstances incident to the crime of rape which strongly tend to corroborate the prosecutrix, while here, the crime, according to its definition, being secret and by consent, there is, under our statute, no corroboration either asked or necessary.

Counsel for the state cite *Bowers v. State*, 29 Ohio St. 542, as being in opposition to the views already advanced. The statute of that state is a peculiar one. It reads: "That any person over the age of eighteen years who, under promise of marriage, shall have *illicit carnal* intercourse with any female of good repute for chastity, under the age of eighteen years, shall be deemed guilty of seduction." It is quite plain that this statute differs materially from ours; because an act of *simple fornication*, without any of the seducer's arts being practiced, without the female being drawn aside from the path of virtue, makes the accused guilty of what might be not inaptly termed *statutory seduction*. Under that statute, the *seduction* is the *result* of the *fornication*, instead of, as under our statute, the *latter* the *result* of the *seduction*. That case, in any view,

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was but lightly considered ; for though it holds that the testimony of the defendant was competent to show that the criminal act was not performed under promise of marriage, and that he had had sexual intercourse with the female before the time of her alleged seduction, yet affirms the judgment of the trial court which refused the defendant an instruction based on and in conformity with such testimony.

Whatever view, however, may be taken of that case, the statute on which it is based differs so much from our own that there is no practical parallelism between them. The case of the *State v. Brassfield*, 81 Mo. 151, is also in opposition to the views herein expressed, but on mature reflection and a careful examination of the authorities there cited, as well as others which have been commented upon, I am of opinion that we went too far in that case as to the rejection of evidence of prior acts of sexual intercourse between the prosecutrix and others than defendant. Of course, no opinion is expressed, because not required by the facts of this record, as to a female who had once fallen, and afterward had reformed, and afterwards had been seduced under promise of marriage.

IV. There was error in permitting Mrs. Loe to testify as to a promise of marriage made by defendant in October, 1881. This was seventeen months after the alleged seduction, and, therefore, could shed no light on what was done at the time the alleged seduction occurred.

For the reasons aforesaid the judgment should be reversed and the cause remanded. Norton and Black, JJ., concur ; Ray, J., in the result ; Henry, C. J., concurs on some points, and files a dissenting opinion.

HENRY, C. J., DISSENTING.—I concur in reversing the judgment, but dissent from so much of the foregoing

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opinion as relates to the proof of specific acts of prostitution alleged to have been committed by the prosecutrix before her seduction by defendant. The case of the *State v. Brassfield*, 81 Mo. 151, recently decided by this court, in which every member of the court concurred, was duly considered and the authorities cited in the opinion delivered fully sustain the conclusions reached. The majority opinion in the present case is an elaborate review of adjudications in rape and seduction cases which have no application at all to the statutory crime for which this defendant was indicted. If the construction placed upon the statute by my associates is the proper construction, then the words, "of good repute," might be stricken from the section as surplusage. The section (sec. 1259, R. S.) is as follows: "If any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute," etc. In the majority opinion the word, "seduce," is defined, and it is contended that it, *ex vi termini*, implies the debauching of a woman who has never been seduced before. If that is what the legislature meant, the section would have declared the seduction of any unmarried female under a promise of marriage to be a felony, punishable, etc.

What was the object of the statute and why were the words, "of good repute," employed? The general assembly evidently bore in mind the fact that a woman may, on one or more occasions, have been led astray and yet not be so abandoned as to make a reformation impossible. That although she may have had sexual connection with one man, it does not follow that she will yield her person to the solicitations of another; and that when such a woman will again be overcome only by a promise of marriage the man shall be punished for procuring her consent by such means. There were two classes of statutes on the subject in the other states of the Union, one containing provisions similar to ours, as in Ohio; and the other differing from it, in that they

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provide for the punishment of seduction in the strict sense of the term, by declaring that the crime shall consist in seducing, by means of a promise of marriage, "a woman of previous chaste character." Under the latter statutes it has been held that proof of specific acts is admissible, for the reason that "previous chaste character" and "virtuous" are synonymous *Andre v. State*, 5 Ia. 339; *State v. Carron*, 18 Ia. 375; *State v. Sutherland*, 30 Ia. 571. But in Ohio, under a statute similar to ours, such evidence was held inadmissible on the ground that the crime consisted not only in seducing a virtuous woman, but a woman of good repute for chastity. *Bowers v. State*, 29 Ohio St. 542. Our legislature chose to adopt substantially the Ohio statute, and, I think, for good and sufficient reasons. If a female is not so abandoned as to have lost her reputation by her unchastity, but has retained enough self respect to conceal it from the world, she may be reclaimed and should be protected against one who would induce her to surrender her person to him upon a promise of marriage, made in order that he might gratify his carnal desires, with no purpose to fulfill his engagement. That he has to resort to such means to accomplish his design is proof conclusive that it was a seduction under a promise of marriage. May not a woman be twice seduced, or oftener? Is it to be recognized and announced as a legal principle that once unchaste always unchaste? Shall the avenues to reformation and respectability be thus forever closed against the victim of a man's licentiousness? Shall the law itself outlaw her, and because she has once been so unfortunate as to fall into a seducer's snares, while amply protecting the more fortunate or less tempted, leave her at the mercy of heartless libertines, to take care of herself if she can? She may be of good repute, moving in the best circles of society, with a determination never again to step aside from the paths of virtue, and shall a heartless libertine, who learns of her former fall, after trying

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all other usual methods and artifices to lead her astray, accomplish his purpose by a promise of marriage and then escape the punishment he so justly merits by proving her former guilt?

That men may be victimized by designing prostitutes is no answer to the argument. No man has to resort to a promise of marriage in order to cohabit with a prostitute, and that a man can only get a female's consent by a promise of marriage is conclusive evidence, to my mind, that that woman as much deserves the protection of the law as one who has always been chaste. The opinion of my associates is pregnant of authorities that do not bear upon the question, and full of sentences that are grammatically and rhetorically faultless; but imputes to the general assembly, by their construction of the act, a heartlessness and indifference toward a class of females, who need encouragement and support in the extremely difficult task of reforming their lives, and resisting the temptations which beset them, of which I do not believe that body guilty. If the general assembly had intended what the majority opinion construes the section to mean, they would never have inserted the words, "of good repute," when there could have been no doubt its import would have been as my associates contend it is now, if these words had been omitted. Effect is, if possible, to be given to every word in a statute, and if those words were not inserted for the purpose herein indicated they are superfluous.

Seduction, says Webster, is: "Appropriately the crime or act of persuading a female, by flattery or deception, to surrender her chastity." If, in the statutes under consideration, our general assembly or the legislatures of other states employed the word in the above sense strictly, as contended by my associates, then if they have provided that if a man should, under a promise of marriage, seduce an unmarried female, he should be guilty of a felony, they would have accomplished all

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that was designed, and the words, "of good repute," "of chaste character," or their equivalents, would have been without meaning and out of place in the statute. And if the word, "seduce," is employed in those statutes in that sense, then it follows that a female who has once fallen can never have the protection of the statute. But the word, "seduction," has another meaning which has been overlooked by my associates. It signifies: "To draw aside or entice from the path of rectitude." A woman, after having once surrendered her chastity, may again be in the path of rectitude and be "enticed" or "drawn aside" from it; and in that sense it was used in our statute. This makes sense of the section, gives effect to all the words employed, and utterly refutes the argument contained in the opinion from which I dissent. The word, "repute," means "character reputed or attributed, established opinion." Repute and character are not synonyms. One may have a reputed character which in fact he is not entitled to, and it is not to be assumed that the legislature was ignorant of the meaning of the terms employed in the statute.

I am utterly unwilling to announce as the proper construction of our statute, that while a man may be incarcerated in the penitentiary and forever disgraced for seducing a chaste female, under a promise of marriage, he may, with impunity, by the same means, lead astray a poor unfortunate who, sorely tempted, once fell, but is endeavoring to lead a virtuous life, determined to err no more. Such need the protection of law, and are as much entitled to it as those who have never been so tempted, or have been so surrounded as to be better able to resist it.

When a woman taken in a fault was brought before Jesus and accused of her crime by Jews who would have stoned her to death, he reproved her accusers, and said to the poor, trembling woman: "Go and sin no more." He thought it possible for her to obey his injunction, and

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I am inclined to believe that the lesson taught by that touching incident was not lost upon the general assembly which enacted the law. I may be in error in my construction of the statute (I do not claim to be infallible), but it is one which does honor to the legislature which enacted it.

It is what, in my judgment, the terms employed import, and so construed it is just such a law as the best interests of society demand, and I think we commit egregious error in overruling the *Brassfield* case.

THE STATE V. VANHOOK, *Appellant*.

Criminal Practice: ARRAIGNMENT OF DEFENDANT. The Supreme Court will reverse a judgment in a criminal case where the record fails to show an arraignment of the defendant.

Appeal from Barry Circuit Court.—HON. W. F. GEIGER, Judge.

REVERSED.

J. M. Patterson for appellant.

B. G. Boone, Attorney General, for the state.

HENRY, C. J.—The defendant was indicted and convicted for selling beer on Sunday. He has appealed from the judgment of the circuit court, and the only error assigned which we deem it necessary to notice, is the failure of the record to show any arraignment of the defendant, and “this, under repeated adjudications, must accomplish the reversal of the judgment.” *State v. Ja-*

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ques, 68 Mo. 260 ; 53 Mo. 234. After the jury is sworn and the trial proceeds, and all the testimony relates to the guilt or innocence of the accused, in a misdemeanor case, it looks like trifling with justice to reverse the judgment, because the record fails to show an arraignment and plea of not guilty ; but it has been held in a number of cases that this is a fatal error, and it is for the legislature, and not for this court to change the law on the subject. Judgment reversed and cause remanded.

WORLEY, *Appellant*, v. THE INHABITANTS OF THE TOWN OF COLUMBIA.

1. **Municipal Corporation : FALSE IMPRISONMENT BY OFFICERS OF ACTION FOR : PLEADING.** A petition in an action against a municipal corporation for false imprisonment by its officers, is fatally defective which fails to state that defendant was arrested for the violation of one of its ordinances, or which omits to set out the cause of said arrest.
2. ——— : **POLICE OFFICERS.** Police officers of a town, engaged in enforcing its police regulations, are not regarded as officers of the town, in its corporate capacity, and the town is not liable for acts done by them while so engaged.
3. ——— : **TRESPASS BY OFFICERS : VOID ORDINANCE.** A municipal corporation is not liable for a trespass, committed by its officers in the enforcement of a void ordinance.

Appeal from Boone Circuit Court.—HON. G. H. BURCK
HARTT, Judge.

AFFIRMED.

W. Gordon, *Squire Turner, S.-C. Major* and W.
O. Forrist for appellant.

(1) The trial court erred in sustaining demurrer to

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petition, as courts cannot take judicial cognizance of charters incorporating towns as they may do of public statutes. 1 Greenleaf's Evid., sec. 479 and 480; *Inhabitants of Town of Benton v. Robinson*, 75 Mo. 194; *Bowie v. Kansas City*, 51 Mo. 454. (2) Appellee as a corporation under its charter had authority to levy and collect taxes off of property, real and personal, and licenses shows, circuses, etc., within its corporate limits, and its ordinance, although void, passed by its board of trustees, requiring appellant, in order to exercise his vocation and trade, to take out an auctioneer's license, was an attempt to exercise its taxing powers, and although done in an unlawful manner, was within the scope of its lawful powers and not *ultra vires*. The ordinance was enacted for a lawful purpose and for the purpose of raising a revenue for the benefit of the corporation, but was wrongfully imposed on a privileged vocation. *Hunt v. City of Boonville*, 65 Mo. 620; *Rowland v. City of Gallatin*, 75 Mo. 134; *Hickerson v. City of Mexico*, 58 Mo. 61; *Soulard v. City of St. Louis*, 36 Mo. 546; *Thompson v. City of Boonville*, 61 Mo. 283. (3) Appellee is civilly liable for damages for a trespass or tort done at its command by its officers and agents in relation to a matter within the scope of the purpose for which it was incorporated, and where acts are done by its authority or by those branches of the corporate government invested with jurisdiction and power to act for the corporation upon the subject, to which the particular act relates, or where after the act has been done, it has been ratified by the corporation. Appellee's charter confers full power upon its recorder to issue his warrant and have brought before him all persons charged with violating the ordinances of said corporation and power to fine and punish all persons for infractions of its by-laws, and confers power on its marshal to arrest all persons, charged with the violation of said ordinances, and power to execute all processes issued by said recorder. Here

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two branches of the corporate government, exercising their lawful powers, but in an unlawful manner, by seizing and imprisoning the body of appellant for the violation of a void ordinance, which clearly makes the appellee liable, as it had no power to punish appellant for exercising the vocation of an auctioneer within the corporate limits of said town. *Soulard v. City of St. Louis*, 36 Mo. 153; Ang. & A. on Corp., sec. 311; *Waterson v. Bennett*, 12 Barb. 196; *St. Louis v. Sternberg*, 69 Mo. 289. (4) The action of the appellee cannot be upheld or sustained as a police regulation. Police is a system of protection either for the prevention of crimes or of calamities. They are laws designed to protect the lives, limbs, health, comfort and quiet of citizens and to secure them in the enjoyment of their property, and can be invoked for this alone, and the court erred in sustaining the demurrer on this ground. *State ex rel. Haresler v. Greer*, 78 Mo. 194.

S. C. Douglass and *W. J. Babb* for respondent.

(1) The trial court did not err in sustaining the demurrer to the second count of the petition. A municipal corporation is not liable for acts of its police officers, when such acts are of a public nature and done in the enforcement of police regulations. *Caldwell v. City of Boone*, 51 Ia. 667; *Buttrick v. Lowell*, 1 Allen, 182; *Hafford v. City, etc.*, 16 Gray, 297; *Town, etc., v. Schroeder*, 58 Ill. 553; *Burch v. Hartwicke*, 33 Am. Rep. 645; *Dillon on Mun. Corp.* 232. (2) The enactment of the ordinance under which appellant was arrested, being without the scope of the corporate power of the respondent, the latter is not liable for the wrongful and illegal acts on the part of the officers engaged in the enforcement of such illegal ordinance. *Dillon on Mun. Corp.* (3 Ed.) sec. 968; *Mayor, etc., v. Cunliff*, 2 Com. (N. Y.); *Adams v. Inhabitants, etc.*, 1 Met. 286.

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RAY, J.—This is an action for damages occasioned by the arrest and false imprisonment of plaintiff, by the officers of the town of Columbia, defendant. A demurrer to the petition, which was in two counts, was successfully interposed at the trial, upon the general grounds that the same fails to state facts sufficient to constitute a cause of action, and upon special grounds set forth in said demurrer. It substantially appears from the first count of the petition, that the defendant is organized under the laws of this state, for the incorporation of towns and villages, and that it had at the time of the commission of the trespass, complained of by the plaintiff, two officers, styled marshal and recorder, and that the marshal, under color of his office, compelled the plaintiff to go with him to the office of the recorder, and by virtue of a pretended *mittimus* issued by said recorder, and with the authority of respondent, did imprison the appellant, by reason of which he was deprived of his liberty. Said first count fails and omits to state whether or not plaintiff was arrested and imprisoned for an alleged violation of a town ordinance, or for what cause, or upon what charge, if any, the said arrest and imprisonment was based.

For aught that appears to the contrary in its allegations, said officers were acting merely as the police officers of said town, and engaged at the time in enforcing the police regulations thereof. When, so acting, their duties are of a public character; their acts are in the interest of civil government and of the public, and they are not, when acting in that behalf, the servants of the town or city, in its corporate capacity. The relations of principal and agent do not then exist, and the town is not liable for their said acts in that behalf. The bare allegations that said marshal and recorder committed a trespass upon the person of plaintiff, though done *colore officii* do not, we think make, a *prima facie* case against

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the municipal corporation, which is not liable for any and all acts and trespasses of its officers, voluntary, malicious and unauthorized, and which, *prima facie*, is not liable for their wrongful acts. This count was, we think, fatally defective, for want of other and further allegations, and statements of facts, sufficient to show the liability and responsibility of the defendant corporation. Dillon on Mun. Corp., sec. 972; *Thayer v. City of Boston*, 19 Pick. 511; *Caldwell v. City of Boone*, 51 Ia: 687; *Bultrick v. City of Lowell*, 1 Allen, 172.

But the grounds of the arrest and imprisonment of plaintiff and the real facts of the case are set out in the second count of the petition, and the general subject and question involved can be more fully presented in connection with our discussion of the case, as disclosed and set forth therein. The facts, as gathered therefrom, are that the plaintiff was arrested by the town marshal, upon a warrant issued by the recorder of said town upon the charge of having exercised the trade and business of an auctioneer within the corporate limits of said town without first obtaining a license as required by the town ordinance. Upon an appearance and jury trial, had before said recorder upon said charge, plaintiff was adjudged guilty and fined twenty dollars, and for the non-payment of said fine was committed and imprisoned in the county jail for five days. On an appeal from the said judgment of the recorder to the circuit court of Boone county, the plaintiff was acquitted.

The town of Columbia is organized under the general laws of the state, its board of trustees has power (sec. 5011, chap. 89, R. S.) to appoint a marshal and other necessary officers and agents and is authorized to pass by-laws and ordinances upon certain subjects, specified in section 5010, chapter 89, Revised Statutes. The said office of recorder was created by a special legislative act, approved February 13, 1849,

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entitled: "An act authorizing the trustees of the inhabitants of the town of Columbia to tax owners and exhibitors of menageries * * * for other purposes," and section six thereof declares the same a public act, etc. It is conceded and agreed that the town ordinance requiring auctioneers to take out said license, and under which plaintiff was arrested and imprisoned, was and is void. The substantial and broad question thus presented, is whether such municipal corporation is liable for a trespass, committed by its officers, in the execution or enforcement of a void ordinance. It is the rule in this state in this class of cases, that the corporation is liable for the act of its agents, injurious to others, when the act is in its nature lawful and authorized, but done in an unlawful manner or unauthorized place, but is not liable for injurious and tortious acts, which are in their nature unlawful or prohibited. *Hunt v. City of Boonville*, 65 Mo. 620; *Rowland v. City of Gallatin*, 75 Mo. 134; *Thompson v. City of Boonville*, 61 Mo. 282.

Counsel for appellant seek to bring this case within the qualified rule of liability, announced in these and other decisions, upon the ground that as the defendant corporation had authority to levy and collect taxes, and to license shows within its corporate limits, the ordinance in question, though void, was enacted for the lawful purpose of raising revenue for the city, and that, though wrongfully imposed upon a privileged vocation, was within the scope of the lawful powers of said town, and that said recorder and marshal in arresting, fining and imprisoning plaintiff for a violation thereof, were exercising their lawful powers as such officers, but were acting in that behalf only in an unlawful manner. These views and deductions are, we think, evasive of the real question involved. Municipal corporations are limited to the exercise of powers expressly conferred, and those not specially delegated are prohibited. Raising revenue for the city is a lawful purpose when confined to sub-

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jects and sources of revenue, authorized by law, for municipalities, but is unlawful, when sought to be derived from subjects and vocations exempted and privileged from taxation, by such corporations. The case made and presented is not one involving the irregular exercise of a power, lawfully possessed by the corporation, which power it could exercise in some other and proper and legal mode, but is an attempt to raise said revenue by requiring said license, without any warrant of authority therefor, and by means of a void ordinance. Under no circumstances and in no contingency could the corporation require said license to be taken out. It was without power to act in that behalf or to make said ordinance, or any other valid ordinance, applicable to such subject for any such purpose. In a discussion of the general subject it is said in Dillon on Municipal Corporations, sections 968 and 966: "It is fundamentally necessary that the act done, which is injurious to others, must be within the scope of the corporate powers, as prescribed by charter or positive enactment (the extent of which powers all persons are bound, at their peril, to know); in other words, it must be *ultra vires*, in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances." * * * "Municipal corporations are unquestionably liable for acts done by their authorized agents or officers in the course of the performance of the corporate powers *constitutionally conferred*, or in the execution of corporate duties." In *Perley v. Inhabitants of Georgetown*, 7 Gray, 464, it is said: "A town is not liable for an arrest and imprisonment by the city collector for non-payment of taxes, illegally included in its warrant and since abated, although it *afterwards pays the collector's fees for serving the warrant and the charges of imprisonment.*"

In *Trustees, etc., v. Shroeder*, 38 Ia. 383, it is held that: "A municipal corporation is not liable for the

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illegal and unauthorized acts of its officers under a void ordinance, nor is it made liable by the fact that its *board of trustees were cognizant of* their tortious acts or even participants therein."

In the case of *Thayer et al. v. The City of Boston*, 19 Pick. (Mass.) 511, it is laid down that, "As a general rule a municipal corporation is not responsible for the unauthorized and unlawful acts of its officers, *though done colore officii*; it must further appear that the officers were expressly authorized to do the acts, by the corporation, or that they were done *bona fide* in pursuance of a general authority to act for the corporation, on the subject to which they relate, or that, in either case, they were adopted and ratified by the corporation."

The case of *Dooley v. Kansas City*, 82 Mo. 444, does not announce a contrary doctrine. Said city was authorized to purchase and hold property beyond the city limits for the erection and maintenance of a pest house. It is there said the action of the city in taking said property, in the emergencies existing, was within the scope of one of the purposes for which it was incorporated. The city charter expressly authorized the property to be acquired for the given purpose, but the premises seized were not acquired by purchase, which was the prescribed manner. The city's method or mode of acquisition was unauthorized and unlawful, but its authority and power to acquire the property for the given purpose in another and proper way was expressly conferred, and its action by its officers and agents when attempting to exercise its lawful power and authority in that behalf, but in an unauthorized manner may be made, under the doctrine of that case, as well as of this, the foundation of a right of action. But the rule is otherwise where, as in this case, the city is incapable of any lawful action upon the given subject, without a further grant of power in that behalf. As said marshal and

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recorder were necessarily without any authority, express or implied, general or special, from said town to do the acts complained of as tortious and injurious, they were not its agents or officers in that behalf and the corporation is not responsible for the damages occasioned thereby.

A further objection urged by appellant is, that courts cannot take judicial cognizance of charters incorporating towns as they may of public statutes. But there was no private charter or private act involved in the case. The defendant corporation is organized under the general laws of the state and said legislative act, creating the office of recorder, is declared to be a public act. See *Boone v. Kansas City*, 51 Mo. 454. As to said ordinances, it is sufficient to say, there was no mention of any ordinance in the first count, and the second count sets out in substance the violated ordinance.

We find no error in the action of the trial court in sustaining said demurrer, and its judgment in that behalf is affirmed. All concur.

HILL *et al.*, Appellants, v. ATTERBURY.

1. **Ejectment: PARTIES.** In ejectment, a landlord has a right on his motion to be made a co-defendant with his tenant.
2. **Practice.** The fact that the trial court overruled plaintiff's motion to strike out matters of defence properly provable under the general issue, affords no ground for reversing the judgment.
3. **Tax Deed: RECITALS: STATUTE.** A tax deed held not void on its face, because it recited that the sale was made on the eighth day of October, 1873, which could not have been the first Monday of that month, the time for which the sale was required by statute to be advertised. 2 W. S., p. 1196, sec. 183.
4. — : — : — . While the statute requires the sales to be

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advertised for the first Monday in October it provides for adjourned sales and the statutory form prescribed for tax deeds does not require therein a recital of the adjournment of the sales from day to day. It only requires that the day on which the land conveyed is offered for sale shall be recited in the deed.

5. **Tax Deed Valid on Its Face:** SPECIAL STATUTE OF LIMITATIONS: EVIDENCE. The tax deed being valid on its face and having been recorded for more than three years before the bringing of the suit, the special statute of limitations was a complete defence for defendant and evidence was inadmissible to show that there was no assessment or levy of taxes on the land or any judgment therefor for the year for which the land was so sold for taxes.
6. **Constitution.** The three years special statute of limitations in reference to tax deeds is constitutional.

Appeal from Buchanan Circuit Court.—HON. J. P. GRUBB, Judge.

AFFIRMED.

Strong & Mosman for appellants.

(1) The motion to make Brown party defendant specified no reasons and should have been denied. R. S., sec. 3557. Revised Statutes, section 2244, is permissive only, not mandatory. (2) The court erred in overruling plaintiffs' motions to strike out parts of amended answer of Atterbury and the entire answer of Brown. (3) The court erred in admitting the quit-claim deed from Brown to Atterbury in evidence. The latter claimed title in fee-simple. A quit-claim deed does not convey land at all, only purports to release some interest therein. *Bogy v. Shoab*, 13 Mo. 380; *Jecko v. Taussig*, 45 Mo. 169. (4) The court erred in admitting in evidence the tax deed to Brown. It showed on its face a non-compliance with Wagner's Statutes, volume 2, section 183, page 1196, and contravened the provisions of Wagner's Statutes, volume 2, section 223, page 1208. (5) The court erred in rejecting plaintiffs' offer to prove that no taxes were assessed against the land for 1872.

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Abbott v. Lindenbower, 42 Mo. 62; *Ewart v. Davis*, 76 Mo. 129. (6) A tax deed void on its face cannot set the special statute of limitations in motion whether the grantee in the tax deed entered upon and held possession of the property or not. *Skinner v. Williams*, 85 Mo. 489; *Mason v. Crowder*, 85 Mo. 526.

Smith & Krauthoff also for appellants.

(1) A tax deed, which shows by its recitals that the land was offered for sale on a day other than that fixed by statute, is void upon its face. 2 W. S., p. 1196, sec. 183; *Mason v. Crowder*, 85 Mo. 526; *Hopkins v. Scott*, 86 Mo. 140; *Eutrekin v. Chambers*, 11 Kan. 368. The sale cannot be upheld as one continued from a previous day unless it further appears that the same was actually begun on the day fixed by law. *Prindle v. Campbell*, 11 Minn. 212; *Sheehy v. Hinds*, 27 Minn. 259. (2) The deed does not recite an offer to sell on the day fixed by law, nor any adjournment from day to day until the time named. Both these facts must appear from the face of the deed; they cannot be presumed. *Hopkins v. Scott*, 86 Mo. 140; *Abbott v. Doling*, 49 Mo. 302, 304; *Yankee v. Thompson*, 51 Mo. 234, 237, *et seq.*; *McDermott v. Scully*, 27 Ark. 226, 228; *Wilkins v. Huse*, 10 Ohio, 139, 141, 142; *Williams v. Kirtland*, 13 Wall. 306, 309; *French v. Edwards*, 13 Wall. 506, 513; *Wamble v. Foote*, 2 Dakota, 227; *White v. Flynn*, 23 Ind. 46. (3) Where a tax deed is void on its face, or is void because of something *de hors* the record showing a want of jurisdiction to make the sale or deed in question, it is not within the provisions of Wagner's Statutes, volume 2, section 221, page 1207. Black. on Tax Tit. (4 Ed.) 401, 402; *Breisch v. Coxe*, 81 Pa. St. 336, 348; *Laird v. Heister*, 24 Pa. St. 452, 463; *Taylor v. Miles*, 5 Kas. 498, 596, 507, *et seq.*; *Carithers v. Weaver*, 7 Kas. 110, 122, 123; *Prindle v. Campbell*, 9 Minn. 213, 219, 220. (4) The matters as to the non-

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assessment of the land, etc., offered to be proved were all jurisdictional and essential pre-requisites to the exercise of the power to sell for taxes. They were necessary to set the statute in motion. Without them, the provisions of the statute never attached to the transaction. Blackw. Tax Tit. (4 Ed.) 114, 116, 174, 276; Cooley on Tax. 259, 292, 324; *Ewart v. Davis*, 76 Mo. 129; 133, 134; 1 Desty on Tax. 449, 450; *McReynolds v. Longenberger*, 57 Pa. St. 13, 27; *Hoffman v. Bell*, 61 Pa. St. 444, 450, *et seq.*

Ramey & Brown for respondent.

(1) Brown was properly made a party. R. S., 1879, sec. 2244; *Hayden v. Stewart*, 27 Mo. 286; *Sutton v. Casseleggi*, 77 Mo. 397. (2) The court properly overruled motions to strike out parts of defendants' answers. (3) The tax deed strictly complies with the statutory requirements as to its form and recitals. (4) The defendants are protected by the bar of the special statute of limitations. 2 W. S., p. 1207, sec. 221. The said statute is constitutional. *Oconto Company v. Gerard*, 46 Wis. 317; *McMillen v. Wehle*, 13 N. W. Rep. 694; *Edgerton v. Byrd*, 6 Wis. 527; *Lawrence v. Kennedy*, 32 Wis. 281; *Wood v. Meyer*, 36 Wis. 308; *Hill v. Kirk*, 66 Wis. 447; *Lindsay v. Fay*, 25 Wis. 460; *Allen v. Armstrong*, 16 Iowa, 508; *Thomas v. Stickle*, 32 Iowa, 71; *Pillow v. Roberts*, 13 How. 472; *Monigona & Co. v. Blair*, 51 Iowa, 447.

NORTON, J.—This is a suit in ejectment to recover certain lands in DeKalb county described in the petition. The cause was taken by change of venue to Buchanan county, where on a trial judgment was rendered for the defendants, from which the plaintiffs have appealed. The suit was brought against defendant Atterbury, and on motion of one Ira Brown, he was made defendant over plaintiffs' objection and this action

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of the court is the first ground of error assigned. In ejectment suits, it is provided by section 2245, Revised Statutes, that "the person through whom defendant claims title to the premises may, on motion, be made a co-defendant." Defendant Atterbury claimed through Brown, and by the very terms of the statute the court was authorized to allow him to come in and defend. *Hayden v. Stewart*, 27 Mo. 286. If Atterbury held the possession of the land under Brown, then Brown had a right as landlord to defend the suit. *Sutton v. Cassellegi*, 77 Mo. 397.

The defence set up in the answer was a tax deed conveying the land in controversy to Brown, and the special statute of limitations of three years under section 221, Wagner Statutes, in force at the time the sale was made. Both answers set up with great particularity all the facts stated in the tax deed, and plaintiffs moved to strike out such portions of the answers on the ground that the matters stated were provable on the trial under the general issue, and should not, therefore, have been pleaded. The statute of limitations relied upon, only applied to cases where a claim of title was set up under a tax deed, and no valid objection can be made to an answer which sets up with particularity the facts which bring the defendant's case within the operation of the statute. If not necessary to plead it with such particularity, and the facts stated could be proved without their being stated under the general issue, the refusal of the court to strike it out was not such an error as to justify a reversal, inasmuch as by such statement the plaintiffs were informed of the specific grounds on which the defence relied, of which they might otherwise have been ignorant until proved on the trial.

At the trial plaintiffs put in evidence various deeds which showed title in them to five-sixths of the land in controversy. To overcome this title, defendants put in evidence a quit-claim deed from Brown to Atterbury,

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dated in July, 1876. They also put in evidence a collector's deed which recites in statutory form, among other things, that the lands in controversy were exposed to sale by the collector on the eighth day of October, 1873, for the taxes of 1872, that they were not sold for want of bidders and were forfeited to the state, and that afterwards on the thirty-first of October, 1873, they were purchased by Ira Brown. This deed was objected to on the ground that it was void on its face, in that it recites that the land was offered for sale on the eighth day of October, 1873, which could not have been the first Monday in October, the time at which the sale was required to be advertised. While the statute provides that such sales shall be advertised for the first Monday in October, it also provides that "the collector shall continue such sales from day to day until all the tracts of land, or town or city lots, contained in the delinquent list on which taxes and costs remain unpaid, shall be sold or offered for sale." 2 W. S., p. 1201, sec. 198. The form prescribed in the statute does not provide for nor require the collector to state in his deed the adjournment of sales from day to day; it only provides that the day on which the particular tract or tracts of land conveyed is offered for sale is the day which is to be recited in the deed. The objection to the introduction of the deed was properly overruled. Declining to insert in this opinion a copy of the deed because of its length we are justified in saying after a careful comparison of it with the statute that it follows strictly and literally the form prescribed in the statute for tax deeds and is upon its face valid and effectual.

It was shown by defendants that all the records and papers of the county court and collector of revenue for DeKalb county relating to the taxes of 1872, were destroyed by fire in 1878 and here defendants rested their case, and plaintiffs offered to prove by competent evidence that the lands in controversy had not been assessed

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for taxes for the year 1872, that no tax book was issued from the office of the clerk of the county court showing a tax levied on said land for 1872, that there was neither petition for judgment, nor judgment, nor execution, nor other process issued directing the collector to sell said land for the taxes of 1872. This evidence was objected to and the objection sustained, and, we think, properly, on the ground that the tax deed being valid on its face and having been recorded for more than three years before this suit was instituted, the bar of the special statute of limitations of three years attached and necessarily by force of the statute shut out such evidence as was offered. *Mason v. Crowder*, 85 Mo. 526; and *Hopkins v. Scott*, 86 Mo. 140, where it is held that recording a tax deed which is valid on its face, puts the three years statute of limitations in motion from the time it is recorded. While counsel make the point that section 221, Wagner's Statutes, page 1207, which declares that "any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of land sold for taxes, or to defeat or avoid a sale or conveyance of land for taxes (except in cases where the taxes have been paid, or the land was not subject to taxation, or has been redeemed as provided by law), shall be commenced within three years from the time of recording the tax deed, and not thereafter * * *" is unconstitutional and void, we have not been cited to any authority which sustains it, but on the contrary the authorities cited in the brief of respondent's counsel from all the states, having similar statutes, sustain the validity of such enactments. Judgment affirmed. All concur.

The State v. Matthews.

THE STATE V. MATTHEWS, *Appellant*.

1. **Criminal Practice : JURORS : STATUTE.** The statutory method of summoning, drawing and impaneling jurors, is directory and not mandatory, and if the jurors are qualified to serve as such, and it does not appear that defendant was prejudiced, the judgment will not be reversed at his instance because of irregularity or informality in their selection.
2. ——— : **EVIDENCE.** Where it is sought to contradict a witness by the contents of a writing signed by him he should not be asked as to statements which counsel may suggest are contained in such writing, but the instrument itself should be read in evidence.
3. ——— : ———. A judgment against a defendant will not, however, be reversed for a violation of the foregoing rule, where it does not appear that the defendant was prejudiced thereby.

Appeal from Washington Circuit Court.—HON. JAMES D. Fox, Judge.

AFFIRMED.

Dinning & Byrnes for appellant.

(1) The judgment should be reversed because the jurors were not properly summoned. (2) The court should have compelled the state to elect on which count it would stand. (3) The judgment should be reversed because of the improper manner in which the witness, Gillam, was cross-examined by the prosecuting attorney.

B. G. Boone, Attorney-General, for the state.

(1) The court will only review the matters of exception preserved in the motion for a new trial. *State v. Dunn*, 73 Mo. 586; *State v. McCray*, 74 Mo. 303; *State v. Preston*, 77 Mo. 294. (2) It was not improper for the prosecuting attorney to question the witness, Gillam,

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on cross-examination, as to what his testimony had been before the grand jury, in this case. Ros. Crim. Ev. (7 Ed.) sec. 141; 1 Greenl. on Ev. (14 Ed.) sec. 462; 1 Whar. Law of Ev. (2 Ed.) sec. 68, and authorities and cases cited; Best's Ev., sec. 474. (3) The instructions presented every phase of the case as shown by the evidence. *State v. Moore*, 61 Mo. 276; *State v. Branstetter*, 65 Mo. 149; *State v. Johnson*, 76 Mo. 127. (4) Unless defendant was prejudiced, it was immaterial whether the panel from which the trial jury was selected was summoned by the sheriff or not. This court has repeatedly held statutes in respect to the empaneling of juries in criminal cases directory. Defendant was not prejudiced through a lack of compliance with the statutory provision, and this court will not interfere. *State v. Pitts*, 58 Mo. 556; *State v. Breen*, 59 Mo. 415; *State v. Knight*, 61 Mo. 373; *State v. Ward*, 74 Mo. 256. (5) Not only by our own court, but generally elsewhere, are statutory provisions relating to drawing and summoning juries treated as directory. Irregularities and informalities in such selecting and summoning, constitute no ground for challenging the array. If jurors are qualified individually, the defendant is not prejudiced. Thomp. & Mer. on Juries, sec. 146; *Mitchell v. State*, 43 Tex. 517; *Perry v. State*, 9 Wis. 19; *Rafe v. State*, 30 Ga. 60; *State v. Baldwin*, 2 Hun, 379; *Com. v. Walsh*, 124 Mass. 32; *State v. Hascall*, 6 N. H. 352; *State v. Gut*, 6 Minn. 341.

RAY, J.—The defendant, who is a colored man, was indicted for a felonious assault on one Henry Johnson, a white man, and upon arraignment and plea of not guilty was tried, convicted and sentenced to imprisonment in the state penitentiary for a term of three years. The difficulty between them arose over a game of cards for a bottle of bitters at the store of one Gillam, in Washington county, Missouri. Johnson received a number of cuts from a knife, a severe and dangerous one in the ab-

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domen, from the effects of which after some months he recovered. There were present at the time, the defendant and said Johnson, and one White and said Gillam. Of these Johnson and White were introduced for the state, and Gillam and the defendant in the defendant's behalf. It is perhaps sufficient for the present to say of the evidence that it was very conflicting, and as it appears in the bill of exceptions, apparently pretty evenly balanced, making the case one for the jury, who are the judges of the credibility of the witnesses and of the value of their testimony, as the same is delivered in their presence. The indictment contains three counts: The first is drawn upon section 1262, Revised Statutes, formerly section 29, General Statutes, and charges a felonious assault with intent to kill on purpose and of malice aforethought with a deadly weapon. The second is drawn upon section 1263, Revised Statutes, formerly section 32, General Statutes, and charges a felonious assault. The third is drawn upon section 1264, Revised Statutes, formerly section 33, General Statutes, and charges a felonious maiming, wounding, etc. At the close of the evidence the defendant moved the court to compel the state to elect on which of said counts it would go to the jury, but this the court refused to do and defendant excepted; but as this exception was not assigned as error and again brought to the attention of the trial court in the motion for new trial, it must, under the rulings of this court, be deemed to have been thereby waived.

We will first consider a question properly and duly preserved, and arising on the record, and which is urged here for a reversal, which is that a part of the panel from which the trial jury was selected were not summoned by the sheriff or other authorized officer, but by one Stone, who was not a deputy, and who, acting at the request of the sheriff, sent him seven men to serve on the jury. Three or four of this seven composed a part of the panel of twenty-four from which the twelve trial jurors

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were chosen, and two of the seven were part of the panel of twelve that tried the case. This mode of selecting the jury was irregular, and, as we think, highly objectionable, yet the ruling of this court has uniformly been that the statutory method of summoning, drawing, and empaneling juries is directory, and not mandatory, and that if the jurors are individually qualified, under their examination in that behalf before the court, to serve as jurors, and there is no showing of prejudice to the defendant, a verdict and judgment had, will not be disturbed solely for such irregularity and informality in the mode and method of selecting the jury. *State v. Pitts*, 58 Mo. 556; *State v. Breen*, 59 Mo. 415; *State v. Knight*, 61 Mo. 373; *State v. Ward*, 74 Mo. 256.

A very earnest protest is made by counsel for defendant against what they call the oppressive and "bulldozing" manner of the prosecuting attorney in his cross-examination of the witness, Gillam, but this is matter which cannot well be preserved in the record, and must necessarily be left ordinarily to the cognizance and regulation of the trial courts. But in this connection the defendant also presents his objections and exceptions duly preserved to the action of the trial court, in allowing the state's attorney to cross-examine the witness, Gillam, in regard to the evidence given by the witness before the grand jury. The prosecuting attorney asked the witness if he testified before the grand jury, and, exhibiting a written paper, asked if the signature thereto was that of the witness, and whether the writing thus shown him was his evidence taken in this cause before the grand jury, and whether the same was correctly written down. The witness answered that the signature was his, and that he supposed his evidence before the grand jury was correctly written down and set out in the paper. With this written evidence in his hands and in the presence of the jury, the prosecuting attorney was allowed to ask the witness for the purpose of contradict-

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ing and impeaching his evidence just given at the trial, a series of questions as to particular statements made by the witness in his said evidence before the grand jury. The defendant's counsel objected at the time to the questions asked and the evidence offered in this behalf, because the same was illegal and incompetent, and because the state had no right to ask the witness as to the contents of the written paper purporting to be his evidence before the grand jury, and because the paper itself was the best evidence of its contents.

The question, then, is whether it was proper and competent for the purpose of impeaching and contradicting the witness, for the prosecuting attorney to thus select and single out and repeat to the witness such particular sentences and statements as he saw fit, from the evidence before the grand jury and ask the witness if he did not testify to them. The general rule is that if the witness admits the writing to be his, as was done here, he cannot be thus asked as to statements such as counsel may suggest are contained in it, but the writing itself must be read as the only competent evidence of the contents. 2 Greenl. on Ev., sec. 463; *Romertz v. Bank*, 49 N. Y. 577; *Prewitt v. Martin, Adm'r*, 59 Mo. 325. But while such is the rule of evidence, in what was the defendant prejudiced by its non-observance in this case? It appeared that Gillam had been examined before the grand jury; his evidence was in the keeping of the state's attorney, who had not introduced him, and when introduced as a witness by defendant, and thus questioned by the state's attorney, he admitted that the written evidence which the prosecuting attorney then and there held in his hand, was his evidence before the grand jury correctly written down, and denied that he had made statements therein contradictory to those he had made in the presence of the jury, and the prosecuting attorney closed his state's case without reading, or offering to read, the evidence of the witness before the grand jury,

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or any part thereof. Could the jury have drawn any conclusion from any or all this unfavorable to the witness, or the defendant in whose behalf he was offered as a witness? Must not the jury have presumed, from the failure of the state's attorney to introduce the writing, that the same, if introduced, would not contradict, impeach, or impair his evidence, but on the contrary would support the same? Besides this, if the defendant was not satisfied that such was the fact, he then had it in his power to verify that presumption by calling for and reading the same to the jury, and having failed to do so, ought not now to be heard to complain.

Failing to see any error materially affecting the merits of the case to the prejudice of the defendant, the judgment of the trial court is affirmed. All concur.

THE STATE V. NELSON, *Appellant*.

Criminal Practice: MURDER: STATUTE: INSTRUCTIONS. Revised Statutes, section 1654, provide "that any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide." *Held*, that while on a trial of an indictment for murder in the first degree, it is error to give an instruction on murder in the second degree, where there is no evidence to support it, still giving it is, under said statute, not reversible error.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Presly N. Jones for appellant.

(1) There was no evidence to support an instruc-

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tion in the second degree and it should not have been given. *State v. Stoeckli*, 8 Mo. App. 597; s. c., 71 Mo. 559; *State v. Murphy*, 68 Mo. 315; *State v. Andrews*, 76 Mo. 100. (2) Even if an instruction on murder in the second degree was proper, the law was improperly declared. *State v. Ellis*, 74 Mo. 207.

B. G. Boone, Attorney General, for the state.

The indictment is sufficient and there was no error in the trial. The defendant complains that the court committed error in giving an instruction for murder in the second degree. The giving of this instruction will not justify a reversal. Our statutes, section 1654, provides that "any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide." This section has been passed upon by this court and declared to be constitutional. *State v. Hopper*, 71 Mo. 425; *State v. Wagner*, 78 Mo. 644.

HENRY, C. J.—The defendant was indicted in the St. Louis criminal court for the murder in the first degree of one John Smith. On a trial of the cause he was convicted of murder in the second degree and his punishment assessed at imprisonment in the penitentiary for a term of twenty years. On his appeal to the court of appeals the judgment was affirmed and he has brought the cause to this court on appeal.

The only error relied on for a reversal of the judgment, is the giving of an instruction in relation to murder in the second degree, the defendant's counsel contending that the evidence tended to prove either a case of murder in the first degree, or innocence. The instruction should not have been given, because there was no evidence to support it; but it was distinctly

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held, in the case of the *State v. Wagner*, 78 Mo. 644, that this error will not warrant a reversal of the judgment. The decision in that case was based upon section 1654, Revised Statutes, which was held, in the *State v. Hopper*, 71 Mo. 425, to be a constitutional enactment. We are still of the opinion, however, that that section does not require the trial court to give an instruction as to murder in the second degree, if there is no evidence in the cause tending to prove that grade of crime, and, in such case, it should not be given; but, under the statute, it is not such an error to give it as will warrant a reversal of the judgment by this court. The judgment of the court of appeals is affirmed.

THE CITY OF ST. LOUIS V. HERTHEL, *Appellant*.

St. Louis City : CHARTER : ARCHITECTS, LICENSING OF. The city of St. Louis has the authority, under its charter (art. 3, subdiv. 5, sec. 23), to require a license of a person exercising the business of an architect.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Klein & Fisse for appellant.

The charter of the city of St. Louis does not confer upon the municipal assembly any authority to tax architects, and the ordinance upon which this prosecution is based is, therefore, void so far as it concerns those who pursue the calling of an architect. (a) Architects are not specifically named in the ordinance as objects of taxation. The power to tax must be derived, therefore,

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from the general words following the enumeration. But it is familiar law that where general words follow an enumeration of specific things, they are restricted in their application to things of the same class or kind as those enumerated. Under this rule the general concluding words of the ordinance in question cannot be made to extend to architects, for the calling of an architect is not akin to any of the professions or callings enumerated. (b) The act of the general assembly enacted in 1879, relating to the taxing of certain professions, is an amendment of the charter of the city, and operates to eliminate from the charter the professions of the law and medicine. Omitting lawyers and doctors from the classification in the charter, all vestige of right to claim that architects are *ejusdem generis* with any profession named disappears. *City of St. Louis v. Laughlin*, 49 Mo. 559; *Sandman v. Breach*, 7 B. & C. 96; *Regina v. Reed*, 28 Eng. L. & E. 133.

Ashley C. Clover and *Leverett Bell* for respondent.

NORTON, J.—The defendant was prosecuted for conducting in the city of St. Louis the business of an architect without first having taken out a license as provided in an ordinance of said city. Judgment was rendered against him, which, on appeal to the St. Louis court of appeals, was affirmed, from which he has appealed to this court, and the only question involved in the appeal is the validity of the ordinance of the city which provides “that it shall not be lawful for any person to exercise within this city the business of * * * architect without a license therefor.”

It is claimed by counsel for the city that the validity of said ordinance is established by section twenty-six, article three, subdivision five, of the charter, which confers upon the mayor and assembly the power “to license, tax, and regulate, lawyers, doctors, doctresses,

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undertakers, dentists, auctioneers," and after specifying about fifty other pursuits, avocations and trades to which the charter provision applies, concludes with the following words: "and all other business, trades, avocations or professions whatever." On the other hand, it is contended that architects are neither named in the enumeration of avocations, which are required to be licensed, nor embraced in the general words following the enumeration. The proposition so earnestly and ably pressed upon our attention by counsel in the oral argument that whenever general words follow particular words of description, the general words do not enlarge the prior particular words, but are restricted in their application to classes similar to those specifically designated, is fully established by the authorities cited.

While we recognize the correctness of this rule, and using the language of Judge Bakewell, who delivered the opinion of the court of appeals, "must not enlarge the letter of the charter by giving it an equitable construction as in the case of a remedial statute; but we are to construe it according to the intent of the framers, and that intent must be gathered from the language and object of the charter provisions, and giving that language an interpretation neither strict nor strained." The words "all other business, trades, avocations or professions whatever," must not be wholly rejected. The maxim "*expressio unius est exclusio alterius*" is not to be so applied that the city is to be held powerless to tax any calling, not expressly named in its charter by its proper name. We think that architects are, for the purpose of construction here, to be held as *ejusdem generis* with lawyers, doctors, dentists and artists, as exercising a profession of technical character, for the useful exercise of which long and careful study, as well as some special experience is required. Lawyers and doctors belong to the learned professions, strictly speaking; perhaps artists and architects do not; but, nevertheless, neither

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one profession nor the other is purely mechanical; and lawyers, doctors, architects and artists are all classed together as belonging to the liberal professions, and are all *ejusdem generis* in that respect. Judgment affirmed. All concur.

OTIS *et al.*, *Plaintiffs in Error*, v. EPPERSON.

1. **Civil Practice**: ORDER OF PUBLICATION. The order of publication made against non-resident, absent or unknown defendants, must designate therein the paper most likely to give notice to the person to be notified. (R. S. sec. 3500).
2. ——— : ———. When the order of publication is made in term by the court, the order so made must be published in the paper selected by the court.
3. ——— : ——— : JURISDICTION. Where in such case the order made by the court is not published, and instead thereof one made by the clerk is substituted and published, the court will obtain no jurisdiction over the defendants intended to be notified.

Error to Macon Circuit Court.—HON. ANDREW ELLISON, Judge.

REVERSED.

H. Lander for plaintiffs in error.

(1) The court had no jurisdiction to render judgment in the back tax suit as to Mrs. Otis and her trustee, Terbell. The owner of the land in back tax proceedings is the necessary party. *Watt v. Donnell*, 80 Mo. 195; *State v. Clymer*, 81 Mo. 122; *State v. Sack*, 79 Mo. 661; *Vance v. Corrigan*, 78 Mo. 94. (2) There is no power either in the court or clerk to order publication against a non-resident outside of that given by statute, and the provisions of the statute must be strictly

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observed. *Schell v. Leland*, 45 Mo. 289; *Galpin v. Page*, 18 Wall. 351; *Jordin v. Giblin*, 12 Cal. 100; *Ricketson v. Richardson*, 26 Cal. 149; *McMinn v. Whelan*, 27 Cal. 300.

Sears & Guthrie for defendant in error.

(1) The final judgment in the back tax suit cannot be collaterally assailed. *Brawley v. Ranney*, 67 Mo. 280; *Rumfelt v. O'Brien*, 57 Mo. 569; *Latrielle v. Dorleque*, 35 Mo. 233. All mistakes in the publication of the notice to the defendants in the tax suit could and should have been tested in a direct proceeding to review the same. *Cane v. McCown*, 55 Mo. 181; *Wellshear v. Kelly*, 69 Mo. 343. (3) Purchasers at a sheriff's sale are required to look only to the judgment, execution, levy and sheriff's deed. All other questions are between the parties to the judgment and the sheriff. *Lennox v. Clarke*, 52 Mo. 115; *Hewett v. Wetherby*, 57 Mo. 279. (4) The defects in the back tax suit complained of are defects as to form, and not of substance, and were all cured by the verdict and judgment. R. S. secs. 3494, 3568; *Wellshear v. Kelly*, 69 Mo. 343; *Gilkerson v. Knight*, 71 Mo. 405.

HENRY, C. J.—Plaintiffs sued in ejectment to recover possession of the south half of the northeast and northwest quarters of the northeast quarter of section thirteen, township twenty-seven, range fifteen, in Macon county. It is conceded that, on the 1st day of August, 1871, H. G. Otis was the owner of the land, and by deed of that date conveyed it to his co-plaintiff, Henry S. Terbell in trust for Mary A. Otis. The defendants claim, under a sale made by the sheriff of Macon county, on an execution issued upon a judgment of the circuit court, rendered in a cause in which the state to the use of the collector of said county was plaintiff, and H. G. and Mary A. Otis and Henry S. Terbell, were defendants.

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The suit was originally against H. G. Otis alone, but, after he was duly served by publication the petition was amended by making Henry S. Terbell and Mary A. Otis co-plaintiffs, but the amendment was made by simply adding their names in the caption, no change being made in the body of the petition. At the term at which this amendment was allowed, the court made the following order :

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vs.

“H. G. Otis et al. Defendants.

“At this day comes the plaintiff, by attorney, and by leave of court files his amended petition, making Mary A. Otis and Henry S. Terbell parties defendant herein, and the said plaintiff, proving that the said Otis and Terbell are non-residents of the state of Missouri, it is ordered that publication be made notifying said defendants of the pendency of this action, the object of which is to enforce the lien of plaintiff against certain real estate of defendants for delinquent taxes, and to notify them that unless they appear before this court at its next term, beginning on the third Monday in May, 1879, and on or before the 6th day thereof, plead to plaintiff's petition, the matters as therein stated will be taken for confessed and judgment entered in accordance therewith; and it is further ordered that a copy hereof be published in some newspaper according to law, and *this cause is continued.*”

The notice was as follows :

“ORDER OF PUBLICATION.

“In the circuit court in Macon county, Missouri, May term, 1879. The State of Missouri at the relation and to the use of Wm. H. Gooding, collector of the revenue, plaintiff, against Mary A. Otis and Henry S. Terbell, defendants.

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"Now, to-wit: January 24, 1879, this cause being called and it appearing to the satisfaction of the court, that Mary A. Otis, and Henry S. Terbell, two of the defendants in the above entitled cause, are not residents of this state, wherefore it is ordered that said defendants be notified by publication that a civil action has been commenced against them, the object and general nature of which is to obtain a judgment against the said defendants for the sum of one hundred and twenty-seven dollars and sixty-three cents, taxes for the years 1874, 1875, 1876, assessed and levied upon and against the following described real estate owned by the defendants and situate in said county, to-wit: The northeast quarter and the southwest quarter of section thirteen (13), township fifty-seven (57), range fifteen (15), in the county of Macon, together with interest, penalties, and costs already accrued and accruing herein, and to enforce the lien of the state against said real estate for said taxes, interest, penalties and costs, and unless they be and appear at the next term of this court to be begun and held at the court house in the city of Macon, within and for the county of Macon, on the third Monday in May next, and on or before the sixth day thereof (if the term shall so long continue, if not, then before the end of the term) answer the plaintiff's petition, the same will be taken against them as confessed. And it is further ordered that a copy hereof be published, according to law, in the *Examiner*, a newspaper printed and published in the city of Macon, in the county of Macon, aforesaid.

"Witness my hand and the seal of the circuit court of Macon county, this 4th day of February, 1879.

[SEAL.]

T. S. SMEDLEY, Clerk."

The order of publication, made by the court was not published, but one made by the clerk was substituted and published. The statute provides that: "Every order (of publication) against non-residents * * * shall

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be published in some newspaper published in this state, which the plaintiff, or his attorney of record, with the approval of the judge or clerk making the order may designate as most likely to give notice to the person to be notified." R. S., sec. 3500. This is not a formal matter, but a substantial requirement. If the petition is filed in vacation, and such showing made as authorizes the clerk to make the order in vacation, it is to be published in a paper which he approves. If made in term by the court, the paper selected must be approved by the judge. It is not left to the discretion of the plaintiff's attorney, or, when the order is made by the court, to the clerk and plaintiff's attorney; but the court must designate, in the order, the paper "most likely to give notice to the person to be notified."

Other questions are presented by the record, but as our ruling on this point is decisive of the case, it is unnecessary to notice them. The court obtained no jurisdiction over the persons of Mary A. Otis and Terbell or Fabell, and as to them the judgment rendered is a nullity and is reversed, and the cause remanded. All concur.

THE STATE *ex rel.* CLARKSON V. THE ST. LOUIS COURT
OF APPEALS.

Divorce: APPEAL TO ST. LOUIS COURT OF APPEALS: ALIMONY. An appeal from a decree in a divorce suit to the St. Louis court of appeals invests that court with the jurisdiction to hear and determine the cause solely on the record and it has no authority to make an allowance against the respondent in favor of the appellant for the payment of her attorney's fees and expenses of prosecuting her appeal.

Prohibition.

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WRIT AWARDED.

C. P. & J. D. Johnson and *Geo. D. Reynolds* for relator.

(1) The court of appeals is an appellate tribunal only and has no original jurisdiction to allow alimony *pendente lite*. Constitution, art. 6 ; 80 Mo. 470 ; 49 Mo. 381 ; *Kamp v. Kamp*, 59 N. Y. 212 ; *Eskenbrack v. Eskenbrack*, 96 N. Y. 456 ; *Wood v. Wood*, 7 Lansing (N. Y.) 204 ; *McIntyre v. McIntyre*, 80 Mo. 470, and cases cited ; *Winston v. Winston*, 31 Hun. (N. Y.) 290. (2) The circuit court, in which the cause was tried, heard and determined the matter of alimony and allowance of counsel fees ; its action thereon has not been appealed from, and is not before this court for review. (3) The amount asked by appellant is exorbitant and beyond all reason, both with respect to the circumstances of the respondent and the services.

Lodge & Tally and *Taylor & Pollard* for respondent.

(1) Revised Statutes, section 2179, confers the power on the appellate court to allow the alimony. (2) Under the common law the power exists. Bishop on Mar. & Div., secs. 384 and 387. (3) That the circuit court, after the appeal has been allowed, has no further authority to make an order or render a judgment in the case, has been repeatedly decided and is now the undoubted law of this state. *Ladd v. Cousins*, 35 Mo. 515 ; *Stewart v. Stringer*, 41 Mo. 404 ; *State ex rel. v. Sutterfield*, 54 Mo. 394 ; *Oberketter v. Luebebering*, 4 Mo. App. 481 ; *Exchange Bank v. Allen*, 68 Mo. 474.

NORTON, J.—James L. Clarkson, the relator, brought his suit for divorce against his wife in the Iron county

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circuit court, alleging as a ground for divorce such indignities as rendered his condition intolerable. The cause was transferred to the circuit court of the city of St. Louis where, on the twenty-sixth day of April, 1885, the circuit court made an order that plaintiff pay defendant in said suit, or to her attorneys, two hundred and fifty dollars for attorney's fees, and also that defendant pay the wife forty dollars per month till further order of that court. On June 14, 1885, a decree was entered granting plaintiff a divorce, but awarding to the wife the custody of the children and sixty-five dollars per month for their support, and adjudging the costs against plaintiff. No other order for alimony or allowance was ever made. From this final decree the wife appealed to the court of appeals, where, during the pendency of her appeal, she asked that court for an allowance for attorneys' fees and for expenses of prosecuting her appeal. When that court having signified its intention to grant the request prayed for, the plaintiff sued out in this court his writ prohibiting the court of appeals from making the order.

The only question before this court is, whether the St. Louis court of appeals has jurisdiction to make an order on the husband in a divorce suit, pending an appeal in that court, to pay the wife the costs, and counsel fees necessary for the prosecution of her appeal, in a case where the husband was awarded a decree of divorce in the court below. The St. Louis court of appeals has original jurisdiction to issue writs of *habeas corpus*, *quo warranto*, *mandamus*, *certiorari*, and other original remedial writs, and to hear and determine the same, and also has a superintending control over all inferior courts of record in the counties embraced within its territorial jurisdiction. Sec. 2, art. 6, of the Constitution. Besides the original jurisdiction thus conferred its jurisdiction is appellate only. It is clear that the power to make such an order, as we are asked to prohibit

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the court from making and enforcing, is not included in the exercise of its original jurisdiction, and we think it is equally clear that it is not included in the exercise of its appellate jurisdiction. The appeal from the decree in the divorce suit invested the St. Louis court of appeals with jurisdiction to hear and determine the cause solely upon the record as made up in the circuit court, and to affirm, or modify, or reverse the judgment and remand the cause, or to render such judgment as in its opinion the circuit court ought to have rendered.

By section 2179 the circuit court was fully empowered "to decree alimony pending the suit for divorce * * * and enforce such order in the manner provided by law in other cases;" and we doubt not but that the circuit court in granting an appeal to defendant in the divorce suit, could upon a proper showing have made an order requiring the husband to pay her such reasonable sum as in the judgment of the court would enable her to prosecute her appeal. We have in several instances, when the circuit court had failed to allow the wife temporary alimony to prosecute her appeal, refused to entertain motions asking us to make such allowance, holding that to do so would be exercising power not possessed by us either by virtue of our original or appellate jurisdiction. The writ of prohibition for these reasons will be and is hereby awarded as prayed for. All concur.

THE STATE V. SNEED, *Appellant*.

1. **Criminal Law: EVIDENCE.** The judgment reversed because of the improper admission in evidence of the threats and demonstrations of a mob against defendant, occurring shortly after the com- mission of the homicide for which he was on trial.

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2. —: DRUNKENNESS. Drunkenness is inadmissible in evidence on a criminal trial either to show that no crime was committed or to reduce its grade.

Appeal from Jackson Criminal Court.—JAMES K. SHELEY, Esq., Special Judge.

REVERSED.

Jenkins, Clark & Thomas for appellant.

(1) The trial court committed error in allowing the witness, Falks, to state the threats and remarks made by the mob assembled at Sutherland's store soon after the arrest of defendant. In *State v. Jaeger*, 66 Mo. 180, it is said: "And the courts will hesitate long before they will say that the violation of a plain rule of evidence did not operate to the prejudice of the accused." See, also, *State v. Thomas*, 78 Mo. 327; *State v. Holmes*, 54 Mo. 153; *State v. Cox*, 65 Mo. 32; *McKnight v. State*, 6 Tex. App. 158; *State v. Owen*, 79 Mo. 619. (2) The court erred in refusing the instruction asked by defendant, that the jury be allowed to consider the question whether defendant was in such a state of mind, by reason of being drunk, as to be able to form a deliberate purpose necessary to constitute murder in the first degree. *Hopt v. People*, 104 U. S. 631; *Jones v. Commonwealth*, 75 Pa. St. 403; *Kelly v. Commonwealth*, 1 Grant, 484; *Keenan v. Commonwealth*, 44 Pa. St. 55. (3) There was no evidence of any premeditation or deliberation, and from the simple act of killing, the law presumes murder in the second degree, and the court should have instructed the jury on murder in the second degree. *State v. Testerman*, 68 Mo. 408; *State v. Holme*, 54 Mo. 153; *Craft v. State*, 3 Kas. 453; *State v. Ellis*, 74 Mo. 211; *State v. Robinson*, 73 Mo. 308; *State v. Banks*, 73 Mo. 592; *State v. Curtis*, 66 Mo. 13; *State v. Bryant*, 55 Mo. 75.

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B. G. Boone, Attorney General, for the state.

(1) There was no evidence to justify an instruction for murder in the second degree, or a lower grade of homicide. The defendant was guilty of the crime for which he was tried and convicted, or nothing. *State v. Collins*, 81 Mo. 652. (2) It was proper, under the circumstances, for the prosecuting attorney to ask the witness, Parks, how and why the defendant came to say that he killed Loomis in self-defence. The verdict was offered not to show the words or actions of the mob, but to show why defendant made the pretext that his action was in self-defence. The technical words used in the instructions given by the court were properly defined. *State v. Thomas*, 78 Mo. 338. (3) The instruction given in regard to drunkenness of defendant not extenuating the crime, was proper, and was all that our court authorizes upon the subject. *State v. Hundley*, 46 Mo. 415; *State v. Dearing*, 65 Mo. 530; *State v. Edwards*, 71 Mo. 312; *State v. Ramsey*, 82 Mo. 137.

HENRY, C. J.—Defendant was indicted in the criminal court of Jackson county for the murder of C. H. Loomis, on the twenty-sixth of July, 1884. He was tried and convicted of murder in the first degree at the October term of said court, 1884, and has appealed from the judgment. The evidence for the state tended to prove the crime with which he is charged, but the first witness for the state testified as follows: "Sneed was drunk at the time; was quite stupid—did not realize what he had done. The only remark he made after the shooting was in answer to the inquiry: 'why he did it.' He replied: 'I did it in self-defence. He had a knife in his hand and was trying to kill me. If you will go and stretch his hand out you will find a knife in his hand. All I want is justice.'" On re-direct examination, this witness said: "It was at Southerlands grocery store a few

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minutes after the shooting that Sneed said he did it in self-defence." The prosecuting attorney then asked the witness the following question: "How came Sneed to say he did it in self-defence, and when?" The court overruled an objection, and the witness answered as follows: "It was at Southerland's grocery store, when the crowd was about to hang him. Some said, 'let's hang him, let's kill the scamp.' Some one produced the rope which was shown there a while. It was not used for want of a leader. I believe if any one had thrown it around Sneed's neck he would have been swung up. This was during that excitement." On re-cross-examination, this witness said: "Sneed made the statement I have mentioned at Southerland's grocery store in a very few minutes after the shooting—not more than ten minutes. *There had been no threats made when Sneed said in answer to the question 'why he killed the man?' that he did it in self-defence. This was before the crowd gathered. There were no threats made until the crowd gathered.*" The defendant then moved the court to exclude the evidence with regard to threats made by the crowd, and all that was said about hanging, and all that was said by the witness in that connection. This motion was overruled, and therein we think the court committed manifest error.

The only theory upon which such testimony could possibly be admitted, if at all, is that indicated by the very form of the question propounded by the prosecuting attorney, viz: to show that Sneed claimed that he acted in self-defence in consequence of the demonstrations made by the mob, and not that there was really any foundation for such a statement by him. Waiving a decision of that question, for that is not the one before us, it clearly appears upon the re-cross-examination of this witness, that when Sneed claimed that he acted in self-defence, there was no crowd there; there had been no threats of violence, no hostile

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demonstrations made by the mob; and the statements stand as naked declarations of the opinions of those who composed the mob, that the defendant was guilty of murder. To admit such testimony is to permit a jury to determine the guilt or innocence of the accused, not upon the legitimate evidence in the cause only, but to take into consideration also the state of public opinion upon the subject. The learned special judge must have overlooked the testimony of this witness on his cross-examination, showing that Sneed's statement could not possibly have been induced by the remarks and demonstrations of the mob which all occurred after he had made the statement. The defendant complains that no instruction with respect to murder in the second degree was given; and testimony which it is claimed warranted such an instruction is that of the state's first witness, and others, as to the drunken condition of the accused when he killed Loomis.

The court holds that evidence of that character is wholly inadmissible, either to show that no crime was committed, or to reduce its grade from murder in the first degree to murder in the second. On this point I differ from my associates, and think that the great weight of authority as well as reason is in favor of the contrary doctrine. For the errors committed by the court in not excluding the statements of the witness with regard to the performance of the mob and their threats and demonstrations against Sneed, the judgment is reversed and the cause remanded. Sherwood and Black, JJ., concur. The other judges dissent.

The State v. McNeary.

THE STATE V. MCNEARY, *Plaintiff in Error.*

1. **Appeal to Supreme Court: MISDEMEANORS.** The Supreme Court has no jurisdiction of appeals from the St. Louis court of appeals in misdemeanor cases.
2. ——— : ———. Nor is the jurisdiction maintainable in this case, which was a conviction for keeping a dramshop without license, on the ground that it involved the construction of the revenue laws of the state.
3. **Dramshop : KEEPING WITHOUT LICENSE.** The fact that there may be no tribunal in the city of St. Louis to grant a dramshop license, is no defence for keeping a dramshop without license in violation of the laws of the state.

Error to St. Louis Court of Appeals.

WRIT DISMISSED.

L. D. Seward for plaintiff in error.*Leverett Bell* for defendant in error.

NORTON, J.—Defendant was prosecuted by information in the St. Louis court of criminal correction for keeping a dramshop without license in the city of St. Louis. He was convicted and fined forty dollars, from which he appealed to the St. Louis court of appeals, where the judgment was affirmed, and from which he has prosecuted a writ of error to this court.

This court has no appellate jurisdiction over judgments rendered by the St. Louis court of appeals in cases of misdemeanor. Article 6, section 12, of the Constitution. The defendant, however, insists that we have such jurisdiction in this particular case, as it involves the construction of the revenue laws of this state. Even though we may so regard the statute requiring a dramshop keeper to pay a license tax before he can legally

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keep a dramshop, there is nothing in the facts of this case as disclosed by the record which requires or demands a construction of the law. Nor is there anything in said facts necessitating a construction of any other law concerning the revenue. The fact as to whether there was or not any officer or tribunal in the city of St. Louis authorized to grant dramshop license could not justify defendant in keeping a dramshop in violation of the law of the state. The writ will be dismissed because we have no jurisdiction to hear the cause. All concur.

THE STATE *ex rel.* CAMPBELL V. THE BOARD OF POLICE
COMMISSIONERS OF ST. LOUIS, *Appellants.*

1. **Power of Police Commissioners.** The power of the police commissioners to appoint a chief of police "for such time as the board may determine," does not include the power to discharge and appoint a chief of police at their pleasure.
2. ———. An appointment of a chief of police without specifying the duration of the term is not void, and the commissioners cannot remove such an appointee at their pleasure.
3. ———. A chief of police cannot be removed by the commissioners before the expiration of his term of office, except for specified causes.
4. **Chief of Police : TERM OF OFFICE.** The statutory limitation of the term of office of a chief of police is four years where the term of his tenure is not otherwise fixed by the order of his appointment.
5. ——— : **PRESUMPTIONS : CERTIORARI.** In proceedings by *certiorari*, it will not be presumed from a record which shows merely the removal of an officer that such removal was for cause shown.
6. **Practice.** In such a proceeding such a record will be quashed.*

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*These syllabi are taken from 14 Mo. App. 297.

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AFFIRMED.

Leverett Bell and *C. H. Krum* for appellants.

C. F. Joy and *J. G. Chandler* for respondent.

HENRY, C. J.—We are satisfied with the conclusion reached by the court of appeals, viz., that the board could not remove Campbell, the chief of police, except for cause. The statute requires the board, when it appoints a chief, to fix the term for which he shall hold the office, and provides that he can only be removed for cause; and the board cannot evade the latter provision, either by neglecting or purposely omitting, to determine the period for which he shall hold the office. To concede to the board such authority would enable them to designate a term of office not warranted by the law, by appointing a chief to hold during their pleasure, and thus thwart the clearly expressed intent of the general assembly, that the chief should not be capriciously removed. It would sanction the acquisition by the board of authority, by their own disregard of the express injunction of the law, to remove the chief for political, or other reasons, in no way touching his capacity, or integrity.

The reasoning of the court of appeals (14 Mo. App. 297) on the question, I think unanswerable, and its conclusions are fully supported by the authorities cited in its opinion. The judgment is affirmed. All concur.

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Thies v. Garbe.

THIES, *Appellant*, v. GARBE, *Executor*.

Practice in Supreme Court. The Supreme Court will not in an action at law, where the evidence is conflicting and no declarations of law were asked or given, review the finding and judgment of the trial court.

Appeal from Andrew Circuit Court.—HON. H. S. KELLEY, Judge.

AFFIRMED.

R. S. Musser for appellant.

(1) The fact that Henry Thies, Sr., was the guardian and sold real estate of appellant worth fifteen hundred dollars in Wisconsin, and that he neither made an annual or final settlement nor accounted to plaintiff for any part of his estate, is proven beyond doubt. (2) The probate court had jurisdiction. (3) The claim of appellant was not barred by the statute of limitations. No time will protect a fraud so long as it is concealed. Perry on Trusts, sec. 861; *Pilcher v. Flinn*, 30 Ind. 201; *Carr v. Hilton*, 1 Curtis (C. C. R.) 390. So long as a trust is a subsisting one and admitted by the act or declaration of the parties, the statute cannot affect it. Angell on Lim., sec. 472; *Ricords v. Watkins*, 56 Mo. 553; *Smith v. Ricords*, 52 Mo. 581. The duties of a guardian do not cease until the property is fully accounted for. *Gilbert v. Gupzell*, 34 Ill. 139; *Cunningham v. McKimley*, 22 Ind. 149; *Weldermin v. Russ*, 33 Conn. 67; *Kane v. Bloodgood*, 7 John. Ch. 90. (4) If the *cestui que trust* is unable to trace the trust fund into the hands of other persons, or into other property in the hands of the trustee, or if he elects not to do so, he may proceed against the trustee personally.

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Perry on Trusts, 843; *Lathrop v. Bampton*, 31 Cal. 17; *Oliver v. Pratt*, 3 How. 333; *Calhoun v. Burnett*, 40 Miss.; *Bennett v. Preston*, 17 Ind. 291. (5) The plaintiff is entitled to compound interest. *Frost v. Winston*, 32 Mo. 489; *Willis v. Fox*, 25 Wis. 646; *Jones v. Foxall*, 15 Beav. 392; *Williams v. Powell*, 15 Beav. 461; *Saltmarsh v. Barrett*, 31 Beav. 349.

William Heren for respondent.

(1) Appellant's claim is barred by the five years statute of limitations. R. S., sec. 3230; *State v. Willi*, 46 Mo. 236; *Ball v. Tomson*, 4 W. & S. 557; *Green v. Johnson*, 3 G. & J. 389. (2) The preponderance of the evidence shows that appellant's claim was fully paid off and satisfied in the lifetime of his father. No declarations of law were asked or given and the finding of the lower court is conclusive. *Parkinson v. Coplinger*, 65 Mo. 290; *Harrison v. Bartlett*, 51 Mo. 170; *Wilson v. Ry.*, 46 Mo. 36; *Gould v. Smith*, 48 Mo. 43; *Doughlan v. Orr*, 58 Mo. 573; *McHugh v. Meyer*, 61 Mo. 334.

RAY, J.—This case was commenced in the probate court of Andrew county on December 15, 1879, upon the following statement of account:

“Henry Thies, Jr., states that he was possessed in his own right of real estate in Grant county, state of Wisconsin, when an infant three years of age. That Henry Thies, Sr., deceased, was, upon his own petition to the probate court of Grant county, state of Wisconsin, appointed guardian for the appellant and for the estate of the appellant, and that he accepted said guardianship and trust, and was duly qualified and entered upon the duties of the said guardian January 30, A. D. 1855. That said Henry Thies, Sr., as such guardian, on the thirty-first day of January, 1855, petitioned said probate court for an order to sell the real estate of said minor, Henry Thies, Jr., the appellant herein, that he might in-

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vest the proceeds in lands of less value at that time and greatly enhance the value of the estate of his said ward, Henry Thies, Jr. (the appellant herein), by the time he became of full age. That said real estate was sold in pursuance of the order of said court, on the twenty-first day of April, A. D., 1855, for the sum of fifteen hundred dollars cash, and said sale was approved by said court, and said guardian made deeds to the purchaser by order of said court. That said guardian during the year 1855 moved from the county of Grant, state of Wisconsin, to Andrew county, state of Missouri, where he continued to reside up to the time of his death. That William Garbe is the duly appointed executor of the last will and testament of Henry Thies, Sr., deceased. That said guardian never made any annual or a final settlement of his guardianship in said probate court of Grant county. That said guardian never accounted to this appellant for said money realized from the sale of said real estate, or any part of it, nor has he accounted for the profits arising from said fund, or any part thereof. That there is due this plaintiff at this time at compound interest the sum of five thousand eight hundred and ninety seven dollars and fifty one cents, which amount he asks to be allowed against said estate of Henry Thies, Sr., deceased." The answer of defendant was, first, a general denial; second, payment and satisfaction by the testator in his life time; third, the statute of limitations of five years. The reply was a general denial. On a trial of the cause the defendant had judgment from which the plaintiff appealed to the circuit court, where upon a trial anew the defendant again had judgment, from which the plaintiff also appealed to this court.

In the circuit court the case by agreement was tried by the court without a jury, no instructions were asked or given and the finding of the court was for the defendant, generally, without specifying on which count or whether on both counts of the answer. On this

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state of the pleadings, or the issues thus presented, the evidence in the cause on both counts of the answer as shown by the record was conflicting; that of each party tending to establish his side of the several propositions in dispute, arising thereunder. Under such circumstances a jury might well have found either way. Ordinarily in such cases when no declarations of law are asked or given it is impossible for this court to know upon what theory the trial court arrived at its finding or judgment, or whether it erred or not; and in all such cases the well established doctrine of this court is that it will not undertake to review the finding and judgment of the court below; holding the same to be conclusive upon us. *Parkinson v. Caplinger*, 65 Mo. 290; *Harrison v. Bartlett*, 51 Mo. 170; *Wilson v. Railroad*, 46 Mo. 30; *Gould v. Smith*, 48 Mo. 43; *Douglass v. Orr*, 58 Mo. 573; *McHugh v. Meyer et al.*, 61 Mo. 334. In this case there is nothing in its facts or instruments of evidence calling for a departure from the above rule. The case at bar is, we think, more in the nature of "an action at law for money had and received" by the testator for the use and benefit of the plaintiff "than an action or bill in chancery for matters of purely equitable cognizance," and in such cases this court will not look into the evidence or pass upon its weight (even where, as in this instance, the cause was tried by the court without the aid of a jury) as it might do in the latter class of cases. *Hammons v. Renfrow*, 84 Mo. 332.

We may further add that if the finding and judgment of the trial court on the plea of "payment and satisfaction" in the case is conclusive upon us, as under the authorities we must hold, then it is wholly immaterial how the court below may have held as to the statute of limitation. If the claim was paid by the testator in his lifetime that is the end of the matter. This leads to an affirmance of the case, and it is so ordered with the concurrence of all the judges.

Albert v. Besel.

ALBERT V. BESEL; REGENHARDT *et al.*, *Interpleaders*,
Appellants.

1. **Surety : FRAUDULENT CONVEYANCE.** A surety may buy property of his principal to protect himself on his suretyship, and may do this although the purchase may operate to hinder and delay creditors of the principal of their demands, and although the surety knew that the debtor intended the sale to have that effect, *provided* the surety did not participate in the fraudulent purpose of the debtor.
2. **Fraud : BURDEN OF PROOF.** Where a bill of sale to one is regular on its face and he is in possession of the property purported to be transferred by it, the burden of proof is on him who assails it in an attachment suit, to show that the transaction was fraudulent, and this is true although the party claiming under the bill of sale may have averred in his interplea that the sale was in good faith.
3. **Instructions.** The proper province of an instruction is to submit questions of fact, not propositions of law.
4. **Evidence : INTERPLEA.** On the trial of an interplea issue in an attachment suit, the affidavit for the attachment is not competent evidence against the interpleader.
5. ———: ———. Nor is it competent on the trial of such interplea to prove the absence of any evidence showing the application of such testimony, that the interpleader and the grantor in the bill of sale, under which the former claimed the property, were members of the same church.
6. ———: DECLARATIONS OF VENDOR AFTER SALE. Declarations of one after he has parted with the ownership and possession of property and not made in the presence of his vendee, are inadmissible in evidence against the latter.

Appeal from Cape Girardeau Court of Common Pleas.
HON. R. B. OLIVER, Special Judge.

REVERSED.

Wilson Cramer and E. D. Englemann for appellants.

(1) Regenhardt should have been allowed to state

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why certain notes were taken up and new ones given in their stead. Bump on Fr. Conv. (2 Ed.) 574; *Potter v. McDowell*, 31 Mo. 73. (2) The attachment affidavits read in evidence were incompetent. (3) The declarations of Besel, made after the transfer and while his grantees were in possession of the property conveyed, were not admissible against him. *Stewart v. Thomas*, 35 Mo. 202; *Sutter v. Lackmann*, 39 Mo. 91; *Exchange Bank v. Russell*, 50 Mo. 531; *Boyd v. Jones*, 60 Mo. 471. (4) A debtor may prefer one creditor to another. *Shelley v. Boothe*, 73 Mo. 74; *Daugherty v. Cooper*, 77 Mo. 528; Bump Fr. Conv. 178. Nor is such right affected by the creditor's insolvency or the debtor's knowledge of it. (5) In order to make a conveyance fraudulent, the debtor must participate in the fraud. *Ryan v. Young*, 79 Mo. 32; *Forrester v. Moore*, 77 Mo. 651; *Shelley v. Boothe*, 73 Mo. 77. (6) Fraud will not be presumed, and there is nothing to show that interpleaders acted from any other motive than to save themselves from loss. *Funkhouser v. Lay*, 78 Mo. 462; *Massey v. Young*, 73 Mo. 273; *Henderson v. Henderson*, 55 Mo. 534; *Rumbolds v. Parr*, 51 Mo. 592; *Page v. Dixon*, 59 Mo. 43; Lawson's Presump. Evid., 93, 98 and 439.

J. B. Dennis for respondent.

(1) There is no error in the trial of the cause in the lower court. (2) The several attachment suits were offered to show the probable amount of Besel's indebtedness. (3) Instructions numbered three, four and five given for respondent declare the law as announced by this court. *Porter v. McDowell*, 31 Mo. 62; *Porter v. Stevens*, 40 Mo. 229; *Clafin v. Rosenberg*, 42 Mo. 439; *Wright v. McCormick*, 67 Mo. 426; *Shelley v. Boothe*, 73 Mo. 74.

Albert v. Besel.

BLACK, J.—The defendant, Besel, on the twenty-second of March, 1883, made a mortgage to Meyer on his stock of goods to secure a debt of four hundred and fifty dollars. Schivelbeine about the same time sued Besel for a debt of four hundred dollars. The appellants, Regenshardt, Kempe and Popp, being sureties for Besel, became alarmed, and on the twenty-sixth of April following purchased Besel's entire stock of goods, agreeing to pay him therefor two thousand one hundred dollars, received a bill of sale, and at once took possession of the property so purchased. In payment therefor they gave their notes to the creditors before named, and thus satisfied the mortgage and pending suit. They also gave their notes to the other persons in payment of debts of Besel and upon which they or one or more of them were sureties. The debts thus assumed, including a rent account, amounted to about \$2,000. Two days later the plaintiff brought this suit and attached the property so sold; other creditors brought like attachment suits. The appellants interpleaded for the property setting up their purchase. The plaintiff took issue on the interplea, alleging that the sale was fraudulent. The evidence in general tends to show that the interpleaders paid for the goods the fair value, and that they purchased the same for the sole purpose of protecting themselves, because of their suretyship for Besel on the debts assumed.

They had a perfect right to buy the goods for that purpose, though the purchase might operate to hinder and delay the other creditors in the collection of their demands, and though to their knowledge Besel intended the sale should have that effect, provided they did not participate in the fraudulent purpose of Besel. The instructions given at the request of the interpleaders proceed upon the principles heretofore announced in *Shelley v. Boothe*, 73 Mo. 74, and *Holmes v. Braidwood*,

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82 Mo. 610, and need no special consideration. The first instruction given for the plaintiff placed the burden of proof upon the interpleaders to show that the sale to them was made in good faith and without any intent to defraud the creditors of Besel. The bill of sale is regular on its face. Interpleaders were in possession of the property when the writ of attachment was levied; the plaintiff seeks to show that the sale was fraudulent and, therefore, void as to him. The burden of proof was upon him to show that the transaction was in fact fraudulent, and the instructions should not have been given. *Gutzweiler, Adm'r, v. Lackmann*, 39 Mo. 91. It makes no difference in this respect that the interpleaders in their interplea say the sale was in good faith. There is really no evidence in the case tending to show that the interpleaders ever agreed to turn back to Besel any part or portion of the goods purchased by them, and for this reason the third instruction given at the request of the plaintiff, which hypothecates in part that state of facts, should not have been given. It is well enough as a proposition of law to say that: "Fraud is seldom susceptible of direct proof, but may be established by a number and variety of circumstances, which though apparently trivial and unimportant when considered separately, may, when combined together, afford irrefragable proof of fraud." But an instruction couched in that language is more liable to mislead jurors than to aid them in the determination of questions of fact. It is true the instruction uses almost the exact language used by the court in *Hopkins v. Sievert*, 58 Mo. 201, but it does not follow that it is good as an instruction. The proper province of an instruction is to submit questions of fact, not propositions of law. It is well enough to instruct that although it devolves upon the party alleging fraud to prove it, yet the proof need not be of a direct or positive character, but may be gathered from the surrounding circumstances indicative of a design to

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hinder, delay or defraud creditors. *Burgert v. Borchert*, 59 Mo. 80.

The affidavit for attachment made in this suit and those made in the other suits, stating that Besel had fraudulently disposed of his property, etc., were wholly incompetent. It is impossible to see upon what ground or for what purpose they could be received as evidence on the trial of the interplea. They should have been excluded. Again if the plaintiff desired to show that Besel was indebted to other persons he should have done so by competent evidence. The production merely of accounts sued upon and upon which judgment had not been recovered was not sufficient proof. It does not appear that the accounts were admitted by the debtor to be correct. It was entirely competent for Regenshardt when on the witness stand to state why and for what purpose they, the interpleaders, took up the notes held by others and gave their notes therefor; so, too, it was proper for him to state whether or not he knew the notice of sale under the Meyer mortgage had been posted. Several witnesses were allowed to state that interpleaders and Besel belonged to the same church organization, and not a word of evidence is offered to give such testimony any application to the case. While we might not feel justified in reversing a cause because of the admission of such evidence, still it was irrelevant and ought to have been excluded. Declarations of Besel made after the sale was completed, and after the interpleaders had taken possession of the property, and not made in their presence or that of either of them, should have been excluded. They were not competent evidence as against the interpleaders, the vendees. *Stewart v. Thomas*, 35 Mo. 207; *Enders v. Richards*, 33 Mo. 598; *Weinrich v. Porter*, 47 Mo. 293. The judgment is reversed and the cause remanded. All concur.

The City of St. Louis v. The St. Louis University.

THE CITY OF ST. LOUIS, *Appellant*, v. THE ST. LOUIS
UNIVERSITY.

1. **City :** DEDICATION OF STREET, ACCEPTANCE OF. There can be no dedication of land to a city for a street without an acceptance of the same by it.
2. — : —. A city cannot accept the dedication of land outside of its territorial limits for street purposes.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Leverett Bell for appellant.

(1) The plat of "Connor's addition to St. Louis," made in 1817, and the conveyances through which the defendant now holds its property adjoining Tenth street, made in the years 1820, 1821, 1827, 1828 and 1849, recognizing said plat and conveying premises, describing them as bounded by Tenth street, as established by said plat, amounted in law to a dedication of the street for public use. Angell on Highways, sec. 142, fully sustained by *Livingston v. Mayor*, 8 Wend. 85; *Wyman v. Mayor*, 11 Wend. 486; *Matter of Thirty-second Street*, 19 Wend. 128; *United States v. Chicago*, 7 How. 196; *Irwin v. Dixon*, 9 How. 31; *Rector v. Hartt*, 8 Mo. 457; *Hannibal v. Draper*, 15 Mo. 634; 2 Dill. Mun. Corp. (3 Ed.) sec. 640. (2) The right to the premises was not lost by non-use. 2 Dill. M. C. (3 Ed.) sec. 675; *Commonwealth v. Alberger*, 1 Whar. 486; *Philadelphia v. Railway*, 58 Pa. St. 263; *City v. Canal Co.*, 12 N. J. Eq. Rep. 561. (3) But the possession of the defendant of the street in controversy was a permissive, and not an adverse possession, and, therefore, although such possession has continued since 1829, it has not ripened into

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a title. Angell on Limitations, sec. 354; *Lane v. Kennedy*, 13 Ohio St. 42; *Pease v. Lawson*, 33 Mo. 35. (4) The fact that taxes were assessed on the premises sued for, and payment thereof made by the defendant, does not estop the city from claiming the property. *St. Louis v. Gorman*, 29 Mo. 593. (5) A municipal corporation can maintain ejectment for a street. (6) The court erred in refusing instructions as asked by plaintiff and in giving instructions for defendant.

Madill & Ralston for respondent.

(1) The evidence is insufficient to establish a dedication of the premises in controversy to the city. To constitute such dedication there must be first a plain, unequivocal intention to appropriate the property to public use, and also an acceptance, by user or otherwise, by the public. *Becker v. City of St. Charles et al.*, 37 Mo. 13; *Brinck v. Collier*, 56 Mo. 160; *Slate v. Carver*, 5 Strobbh. (So. Car. Law) 217; *Remington v. Millerd*, 1 Rh. I. 93, 97; *Holdane v. Trustees of Cold Spring*, 21 N. Y. 474—(affirmed in *Bissell v. N. Y. C. Ry.*, 23 N. Y. 65); *People v. Baubien*, 2 Doug. (Mich.) 256; *Livandias v. Municipality*, 16 La. 509, 514-15; *David v. Municipality*, 14 La. An. 872; 2 Greenl. Ev. (13 Ed.) sec. 662. (2) But even if there was sufficient proof of dedication to the city on the part of Conner, there is no evidence whatever to show acceptance of it by the city. Acceptance is as essential as a dedication. *Becker v. City, etc.*, 37 Mo. 13; *Brinck v. Collier*, 56 Mo. 160; *Irwin v. Dixon*, 9 How. 10. (3) Such acceptance must be made within a reasonable time. *Crockett v. City, etc.*, 5 Cush. 182; *Baker v. Johnson*, 21 Mich. 345; *Guthrie v. New Haven*, 31 Conn. 323. (4) The city is estopped to deny the ownership of the property in dispute by defendant and its grantors whom it has permitted, under claim of right, to occupy the same ever since it was brought into the city in 1841 and pay taxes thereon

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levied by itself. *Simp'ot v. Dubuque*, 49 Iowa, 630, citing *Bullis v. Noble*, 36 Iowa, 618; 2 Dill. Mun. Cor. sec. 533 (2 Ed.) being sec. 675 of 3 Ed.; *Brinck v. Collier*, 56 Mo. 160. (5) The premises in question have been in the actual, open, notorious, exclusive, uninterrupted, adverse possession and private occupancy of defendant, under a claim of right, evidenced by inclosure on all sides and valuable improvements thereon erected, for fifty-two years before this action was brought. Such being the case, the plaintiff's rights, if any it ever had, are barred by the statutes of limitation. *County of St. Charles v. Powell*, 22 Mo. 525; *Callaway County v. Nolly*, 31 Mo. 393; *Abernathy v. Dennis*, 49 Mo. 469; *School Directors of St. Charles Township v. Georges et al.*, 50 Mo. 194; *McCartney et al. v. Alderson et al.*, 54 Mo. 320; *State v. Culver*, 65 Mo. 607; *State v. Young*, 27 Mo. 259; *Alves Executors and Heirs v. Town of Henderson*, 16 B. Mon. 131, 69, 72; *Knight v. Heaton*, 22 Vt. 480; *Davies v. Huebner*, 45 Iowa, 574; *Varick v. New York*, 4 Johns. Ch. 53; *Baldwin v. Buffalo*, 29 Barb. 396; 8 Ohio, 298; 5 Ohio St. 594.

HENRY, C. J.—This is a suit in ejectment to recover a strip of land sixty feet wide fronting on the north line of Washington avenue in the city of St. Louis, and extending thence northwardly about two hundred and twenty-five feet to the south line of Christy avenue, and which plaintiff alleges forms a part of Tenth street. On a trial of the cause there was a judgment for defendant, from which an appeal was taken to the court of appeals, by which the judgment was affirmed *pro forma*. The city relies upon a dedication of the strip of land in controversy as a street, by Jeremiah Conner in 1817, by a plat of an addition to St. Louis made by him, in which this street was marked and defined, and recognition thereof in subsequent deeds by successive owners of the abutting land. When Conner's plat was made, the par-

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cel of land in dispute was within the limits of the town, but in 1822 the charter fixed the western limit of the city east of this land, and it remained unchanged until 1841, so that from 1822 to 1841 this strip was not within the limits of the city.

After the alleged dedication and while the land was within the city limits, no formal act of acceptance on the part of the corporation, nor any public use of this strip as a street, was shown, and the first act relied upon as an acceptance or recognition of the dedication occurred in 1824. On July 10, 1823, Rene Paul, then city surveyor, was ordered by the board of aldermen to make and return to the board a plat of the city. He made the map and embraced in it the property platted by Conner in 1817, showing Tenth street on the map as it is now sought to open it. This map was approved by ordinance March 29, 1824. But when this map was made and approved neither the strip nor the land east of it for a considerable distance was within the city limits.

The city had no jurisdiction. It could then no more accept a dedication of this street than of one miles distant from the city limits. From that day to the institution of this suit in 1881, a period of sixty-two years, nothing has been done indicating an acceptance of the dedication, and at least fifty years ago this strip of land was enclosed and substantial buildings erected upon portions of it, which have ever since been occupied and used. There is no necessity to resort to the statute of limitations, to defeat the plaintiff's claim. To constitute a dedication to the public otherwise than as the statute provides, the intention to make it must be clear; yet, however clear the intent to make it the object is not accomplished until its acceptance by the public by use or otherwise. *Becker v. City of St. Charles et al.*, 37 Mo. 13; *Brinck v. Collier*, 56 Mo. 160. No private person can establish a public highway over his land without the consent of the public. In this, as in matters

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of contract between individuals, it takes more than one to make a bargain. Said Ch. J. Williams in *Page v. Weathersfield*, 13 Vt. 429: "I know of no way in which an individual can lay out a highway for his own benefit and compel the town to adopt it." Until an acceptance the owner may resume his dominion over the property as against the public and thus revoke a dedication, made otherwise than as provided by statute. As between him and persons who have acquired individual rights to have it left open as a highway a different question would be presented, but it is not in this record. The *People v. Beaubien*, 2 Doug. (Mich.) 269, has several times been cited with approval by this court. There the proprietor had laid out an addition to the city of Detroit, and on his plat marked a street which the city never recognized and the court held that there was no dedication so far as the public was concerned.

There is no testimony in this case tending to show that the strip in controversy was ever used as a street or public highway for a day or an hour, within the sixty-nine years which have elapsed since Conner made his plat, or that anything has been done by the city with respect to this strip of land, except the approval of the map made in 1823 by Rene Paul, who had the same authority to embrace in his map the entire county of St. Louis, as to include that platted by Conner in 1817. The map made by Paul and its approval by the board of aldermen of the city, have no legal significance whatever, for it is a conceded fact that when it was made and approved the land was not within the limits of the city. The approval of the map was an act of the most equivocal character, so far as relates to that portion of the land included in it, beyond the city limits. But even if it was as clear as sunlight that the board meant by that approval to accept on behalf of the city the dedication made by Conner, it was a matter not within their jurisdiction, and in which the city then had no concern. The judgment is affirmed. All concur.

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LIONBERGER, Assignee, v. KRIEGER *et al.*, Appellants

1. **Bank Cashier, Bond of:** INCREASE OF CAPITAL STOCK OF BANK: SURETIES. The increase of the capital stock of a bank, held not to discharge the sureties on the cashier's bond.
2. ———: ESTOPPEL. Where the cashier's bond recites that he had been appointed by the board of directors, such recital is conclusive on the sureties.
3. **Bank Cashier: BOND OF.** The fact that one was appointed cashier of a bank who was not a director as required by statute (G. S., p. 365, sec. 3), does not render his bond for his fidelity in office invalid.
4. ———: ———. A bank has the right to require a bond of its cashier, although there is no statute requiring it, and the sureties are liable on it as a common law bond.
5. ———: ———. The subsequent enactment of a statute requiring a bond does not affect the validity of such common law bond.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

E. T. Farish and F. K. Ryan for appellant.

(1) The plaintiff in this case has the same rights, and no other, as the Broadway Savings Bank. *Harris v. Babitt*, 4 Dill. 185. The fact that Krieger was not a director and had not been appointed to the office of cashier, was well known to the president and directors of said bank, when the bond was executed by defendants as sureties. (2) The defendants are not estopped to deny the recital in the bond that Krieger had been appointed cashier by the board of directors. Brandt on Suretyship, 42; *Hudson v. Inhabitants, etc.*, 35 N. J. 437; *Thomas v. Burrows*, 23 Miss. 588. The doctrine in respect to *de facto* cashiers or officers, can only be invoked where the public is concerned. *Currie v. Mut.*

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Ass'n, 4 Her. & Munf. 346. (3) The bond is inoperative because when Krieger was retained in office after the first year, it was by resolution and not by ballot, and it was when he was ineligible to the position because not a director. Thompson on Offices, 515; 1 Allen, 339; 1 Peters, 46; *Mayor, etc., v. Crowell*, 40 N. J. (L.) 212. (4) The increase of the stock released the sureties on the bond. Thompson on Offices, 531; Brandt on Suretyship, 461; *Grocery Bank v. Kringman*, 16 Gray, 475. *Blair v. Perpetual Ins. Co.*, 10 Mo. 566; *Home Savings Bank v. Traube*, 6 Mo. App. 221; *State to use of Carroll v. Roberts*, 63 Mo. 234; *Miller v. Stewart*, 9 Wheat. 702. (5) When the law of 1877 (R. S. 1879, sec. 919), went into effect, it superseded any by-law of the bank, and required a new bond in conformity with its provisions. (6) The action of the board of directors in accepting from Krieger the old bond, after the death of Fortune, operated to release the securities remaining thereon.

Hough, Overall & Judson also for appellants.

(1) The rule is inflexible, both at law and in equity, that the surety is not to be held liable beyond the precise terms of his contract, and is never to be implicated beyond his specific engagement. *Prior v. Kiso*, 81 Mo. 249; *Nofsinger v. Hartnett*, 84 Mo. 549; *Ludlow v. Simonds*, 2 Carne's Cases, 57; Brandt on Suretyship, secs. 79, 80; *State ex rel., etc., v. Boone*, 44 Mo. 262; *Miller v. Stewart*, 9 Wheat. 680; *State v. Meday*, 17 Ohio, 565. (2) The increase of the capital stock of the bank changed the contract and discharged the sureties. *Grocer's Bk. v. Kingham*, 1 Gray, 474.

John D. Davis and *G. A. Madill* for respondent.

(1) The section of the statute governing savings
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banks (G. S. 1865, chap. 68, sec. 3), which directs the cashier to be selected from among the directors, does not vitiate this bond, though the cashier was not a director. It is a ground of complaint which the state alone can make. *State v. Cooper*, 53 Miss. 615. This provision contains (as to selection of cashier), no prohibitory or negative words, and announces no penalty or other consequences, if it is not complied with; it is, therefore, simply directory and not mandatory. *Bank of Brigh-ton v. Smith*, 5 Allen, 413-417; *State ex rel. Atty Gen'l. v. Mead*, 71 Mo. 266-269; *West v. Ross*, 53 Mo. 350-354; *City of Cape Girardeau v. Riley*, 52 Mo. 424; *City of St. Louis v. Foster*, 52 Mo. 513; *Jump v. McClurg*, 35 Mo. 193-196; *Hicks v. Chouteau's Adm'r*, 12 Mo. 341. (2) The defendants are estopped by the recitals of the bond from claiming exemption from its obligations by reason of the fact that the principal was not eligible to the position of cashier, or that he was not duly elected. *Barada v. Carondelet*, 8 Mo. 644-649; *Western Boat-men's Benevolent Ass'n v. Kribben*, 48 Mo. 37-43; *Hundley v. Filbert*, 73 Mo. 34; *Commonwealth v. Teal*, 14 B. Monroe, 29; *Williamson v. Woolf*, 37 Ala. 298; *Sprowl v. Lawrence*, 33 Ala. 674-688; *Green v. Wardwell*, 17 Ill. 278; *Jones v. Scanland*, 6 Humph. 195; *United States v. Maurice*, 2 Brock. 97, 113; *Crawford v. Howard*, 9 Geo. 314; *Stephens v. Crawford*, 1 Kelley, 574; s. c., 3 Kelley, 499; *Iredell v. Barbee*, 9 Iredell, 250; *Aulanier v. Governor*, 1 Texas, 653; *Mayor of Homer v. Merritt*, 27 La. Ann. 568. (3) The sureties upon the bond of a *de facto* officer, as well as the officer himself, are estopped to deny the validity of his appointment, when sued for money received by him in his official capacity. *Taylor v. State*, 51 Miss. 79; *State v. Cooper*, 53 Miss. 615; *Boone Co. v. Jones*, 54 Ia. 699; *State v. Rhoades*, 6 Nev. 352; *Monteith v. Commonwealth*, 15 Gratt. 172; *People v. Jenkins*, 17 Cal. 500; *Town of Lyndon v. Miller*, 36 Vt. 329; *State v. Bales*,

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36 Vt. 387; *Shroyer v. Richmond*, 16 Ohio St. 455; *Marshall v. Hamilton*, 41 Miss. 229; *Jones v. Scanland*, 6 Humph. 195. (4) The act of 1877, concerning savings banks (1 R. S. 1879, sec. 917), providing that cashiers shall be required to give bond conditioned as therein directed, did not vitiate the bond in suit, because not in exact conformity therewith. This statute is also merely directory and not mandatory. *Bank of Brighton v. Smith*, 5 Allen, 417, and cases cited, under point (2). (5) Though bond were not good as a statutory bond, yet, if it contravenes no rule of law or of public policy, it is good as a common law bond. *Henoch v. Chaney*, 61 Mo. 131; *Graves v. McHugh*, 58 Mo. 499; *Barnes v. Webster*, 16 Mo. 258-265; *Bank of Brighton v. Smith*, 5 Allen, 413-415; *Grocer's Bk. v. Kingman*, 16 Gray, 474; *United States v. Bradley*, 10 Pet. 343. The bond sued on is in substantial compliance with the provisions of section 917, Revised Statutes, 1879. (6) The bond in suit continued obligatory during the entire time Krieger, Jr., acted as cashier. (7) A bond given to secure the faithful performance of an officer's duties during his continuance in office, whether under present appointment, or any re-appointment, is obligatory after expiration of first appointment. *DeColyar on Guarantees*, 232; *Augero v. Keene*, 1 M. & W. 390; *Long v. Seay*, 72 Mo. 648; *Savings Bk. v. Hunt*, 72 Mo. 597. (8) The death of James Fortune, one of the securities on said bond in 1874, did not avoid the bond or release the sureties from further liability. (9) The fact that the capital stock of the Broadway Savings Bank was increased after the execution of the bond sued on, and that part of such increased capital was paid in, does not release the sureties. *Morse on Banks and Banking* (2 Ed.) 241; *Bank of Wilmington & Brandywine v. Wollaston*, 3 Harrington, 90, 96; *Thompson on Liability of Officers*, 532; *Morris Canal, etc., Co. v. Van Vorst's Adm'r*, 21 N. J. L. 100; *Railway*

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Co. v. Goodwin, 3 Wels., Hurl. & Geo. 320; *Gausson v. U.S.*, 97 U. S. 584; *Brandt on Suretyship and Guaranty*, secs. 343, 344; *Strawbridge v. B. & O. Ry.*, 14 Md. 360; *Exster Bk. v. Rogers*, 7 N. H. 21, 27, 31; *U. S. v. Woodman*, 1 Utah, 265; *Commonwealth v. Holmes*, 25 Gratt. 771; *Howe Sewing Mach. Co. v. Layman*, 88 Ill. 39.

BLACK, J.—This is a suit upon the bond of the cashier of the banking corporation of which the plaintiff is the assignee, under the laws of this state relating to voluntary assignments. The bond is dated February 13, 1869, and is in the penal sum of twenty thousand dollars. It is conditioned as follows:

“Now, if the said J. Philip Krieger, Jr., shall well and truly and faithfully perform the duties of cashier of said bank, for and during all the time he shall hold such office of cashier of said bank, and for and during all the time he may continue or act as such cashier of said bank, whether under the present appointment, or under future re-appointments, and shall well, truly and faithfully account for, and render over to said bank all such money,” etc., “and shall, while he continues in such service, either under the present appointment, or any future re-appointment, faithfully, and to the best of his ability, perform all trusts reposed in him, and all duties devolved on him by the law of the land, or by any by-law, rule, order or resolution of said board, now existing or hereafter made, enacted or adopted, not inconsistent with the laws of the land, then,” etc.

Krieger entered upon his duties and continued to act as cashier until and during the year 1878, under annual re-appointments, made by resolution of the board of directors at the annual election of officers. In 1878, and while acting as such cashier, he made breach of the conditions of the bond to many times the amount of the penalty, the circumstances of which need not be stated.

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1. The bank was organized in February, 1869, under the general laws of this state, with a capital stock of two hundred and fifty thousand dollars, which was increased in April of that year to three hundred thousand dollars; twenty per cent. of the stock, and no more, was paid in. The sureties contend that because of this increase during the first year they are released from all liability on the bond. A surety has an undoubted right to rely upon the letter and strict terms of the bond. "It is not sufficient that he may sustain no injury by a change in the contract, or that it may be even for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal." The rule thus stated in *Miller v. Stewart*, 9 Wheat. 702, has been again and again asserted here and elsewhere by one form of expression and another. But this does not mean that the fair import of the obligation is to be disregarded. Another rule equally binding upon the courts is that in the construction of the contract of a surety, as well as of every other contract, the question is: what was the intention of the parties as disclosed by the instrument read in the light of the surrounding circumstances? Brandt on Suretyship, sec. 80. In the application of these rules of law appellants place much reliance upon the case of *Grocer's Bank v. Kingman et al.*, 16 Gray, 476. There the stock was increased from \$300,000, first, to \$500,000, and then to \$750,000, because of which the sureties on the cashier's bond were held to be discharged. The court observed, "the risk of the sureties was thereby very greatly enhanced, especially as they undertook to save the bank harmless from every loss that might arise from the cashier's mistakes as well as losses arising from his fraud," etc. Because of the liability to answer for mistakes the court distinguished that case from *Bank v. Wollaston*, 3 Harr. 90. In that case the bond was made in 1833, and the stock was increased in 1837, by

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act of the legislature. The sureties of the cashier contended that they were thereby released. The court said: "The simple answer to the proposition is that there was no enlargement of the duties of the officer. The sphere of his duties was the same, although the subject matter of his charge might be increased, which is no more than what happens from day to day, from fluctuation in the amount of deposits." In a recent case decided by the Supreme Judicial Court of Massachusetts (*Railroad v. Loring*, 19 Reporter, 436), the bond was conditioned for the faithful performance of the duties of a ticket agent "which are, or may be, imposed upon him" under this or any future appointment." The agent's salary was increased from one thousand to eighteen hundred dollars per year. The stock of the company was increased from \$2,853,400 to \$4,667,600. At first he sold tickets over one thousand and forty miles of railroad, and for three steamboat lines; the business was increased to twenty-two hundred and fifty miles of railroad and five steamboat lines. Notwithstanding these changes the sureties were held not to be discharged. The reasons assigned are that there was no change in the office, that the nature of the duties remained the same, and that the increase of business was fairly contemplated by the bond, looking at the character of the position which the agent held. See also *Ry. Co. v. Goodwin*, 3 Wels., Hurl. and Gor. 320; *Morris Canal, etc., v. Van Vorst's adm'r*, 21 N. J. L. 100; *Strawbridge v. Ry.*, 14 Md. 360.

The stock, it is conceded, was increased in pursuance of section two, chapter sixty-two, General Statutes, and hence, by virtue of a vote of the directors made in compliance with a vote of the stockholders held in conformity with the by-laws. It is not contended that the sureties would have been released had the whole of the two hundred and fifty thousand dollars been called in, for that, it is conceded, would have been within the

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letter of the bond, so it might be urged that the stock could only be increased by some "by-law, rule, or resolution of the board," based, of course, upon a vote also of the stockholders. But we do not place our result on so narrow a ground. The bond must be understood and read in the light of the then existing law. It must have been in the contemplation of the parties that the bank would enlarge its business by all lawful ways and means, not going beyond a banking business. This it could do, if desired, by increasing its stock. The conditions of the bond are broad, and look to the future and to the making of additional by-laws and rules. That this increase of stock was fairly within the contemplation of the bond, we think, is clear, and the court might well have so declared in its instructions.

2. The statute (G. S., sec. 3, p. 365), devolved the management of the business of the corporation upon a board of directors, "from whom there shall be designated by themselves a president, cashier and secretary, who shall hold their offices for one year, and until their successors are duly elected and qualified." The minutes of the meetings of the board of directors seem to show that Krieger was elected cashier on January 21, 1869; but the records also show that at a second meeting of the incorporators, held on the twenty-sixth of that month, directors were elected, and at the same time the stockholders elected Krieger cashier. The directors, however, fixed the amount of the bond on February 10, and approved the same on March 2, so that they at least approved the appointment, even if not made by them. Besides this, the bond recites that he had been by the board of directors appointed cashier, and that is conclusive in this action on the bond. But the further conceded fact is that Krieger was not a director at any time until January, 1878, when he was duly elected one of the board. Though a constable be appointed in a district in which he did not reside, and the law declared

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that no person should be appointed unless a citizen of the district, yet it was held if he gave bond and incurred liabilities as constable, his sureties were liable on the bond. *Commonwealth for Harris v. Teal*, 14 B. Mon. 29; *Jones v. Gallatin County*, 78 Ky. 491. In a suit upon an officer's bond, where he is only an officer *de facto*, neither he nor his sureties can allege that he was not an officer *de jure*; they are estopped to deny their liability on the bond. 33 Ala. 688; 37 Ala. 304; 54 Vt. 401. It is true these were public officers, but the appointment of Krieger, though he was not a director, was not a prohibited act, and he certainly was cashier for all purposes, and his acts binding as such. We do not see how the fact that he was not a director can make invalid the bond which he gave for his fidelity while in office.

3. At the time the cashier was first appointed the statute did not in terms require a bond, but the bank had an undoubted right to take a bond, and the sureties are liable on it as a common law bond. The act of 1877 did require the cashier to give a bond before entering upon the duties of the office, and prescribed the conditions (R. S. 1879, sec. 917), but the statute did not have the effect to make void any common law bond given by the officer, and the present bond, in plain terms, is made to cover future appointments. It is not contended that any statutory bond was even given at all. Nor did the death of Fortune, in 1874, release the sureties.

We see no reason why the judgment in this case should be disturbed. It is affirmed. All concur.

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SULLIVAN V. THE HANNIBAL & ST. JOSEPH RAILROAD
COMPANY, *Appellant*.

1. **Practice:** INSTRUCTIONS: NEGLIGENCE. In an action for injuries resulting from the alleged negligence of defendant, and in which the issue of plaintiff's contributory negligence is made, an instruction is erroneous which hypothecates the facts as to defendant's negligence, and authorizes a verdict for plaintiff therein without in the same instruction limiting such right of recovery to the absence of such contributory negligence on the part of plaintiff.
2. ———: ———: ———. Such defect in the instruction is not cured by other instructions given in the case which so limit plaintiff's right of recovery if he was guilty of contributory negligence (Black and Norton, JJ., dissenting).

Appeal from Jackson Special Law and Equity Court
HON. R. E. COWAN, Judge.

REVERSED.

G. W. Easley for appellant.

(1) The first instruction given on behalf of the plaintiff, is an authorization of a verdict for the plaintiff, and is erroneous in the following particulars: (a) It ignores the question of plaintiff's knowledge of the defect, and authorizes a verdict for the plaintiff without requiring the jury to pass on the question of whether the plaintiff knew of the broken or cracked tie beam or not. In connection with the third instruction given for the plaintiff, and the seventh refused for the defendant, it authorized a verdict for the plaintiff, although he knew of the defect. *Waldhier v. Railroad*, 71 Mo. 519. Before plaintiff could maintain this action he should have proven that he was not aware of the defect prior to the injury. And an instruction that authorizes a finding for the plaintiff, without submitting the question of such

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knowledge to the jury, is erroneous. *Nolan v. Shickle*, 3 Mo. App. 300; 69 Mo. 336. (b) This instruction is further objectionable in that it bases the plaintiff's right to recover upon the doctrine of *respondeat superior*, and not upon negligence. By this instruction defendant is made liable solely because its servant did not make a safe scaffold, and the instruction bears no intimation of liability because of any negligent act, and it was, therefore, erroneous. *Crispin v. Babbitt*, 81 N. Y. 520; *McDermott v. Railroad*, 30 Mo. 117; Cooley on Torts, 557; Wood on Master and Servant, sec. 429; *Moss v. Railroad*, 49 Mo. 170. (c) The instruction was erroneous in that it rests the case on the ground that the defendant furnished the broken or cracked tie beam as an appliance as part of the scaffold. *Chicago, etc., v. Ward*, 61 Ill. 130; 12 Am. Ry. Rep. 434; *Watson v. Houston*, 11 A. & E. R. R. Cases, 216. (d) This instruction also ignores the question of whether it was necessary for the plaintiff to step upon the defective tie beam, in the necessary and proper discharge of his duties, and this in the face of the evidence, that "it was not necessary for any one to walk out on that tie beam. The other pieces were put there for the men to walk out on." (e) This instruction does not put upon the jury the duty of ascertaining the cause of plaintiff's injury. It authorizes a verdict against defendant without requiring the jury to determine whether it arose from the alleged defect, or from the plaintiff's negligence, which, being pleaded, could not be ignored in plaintiff's instructions. *Gilson v. Jackson Co. Horse Ry.*, 76 Mo. 282. (f) The court erred in giving the second instruction for plaintiff, and in refusing those numbered three, four and five, asked by defendant. The relation between the foreman, Prather, and the plaintiff, was that of fellow servants. Smith's M. & S. (3 Eng. Ed.) 208, and note; Whart. on Neg., sec. 228-3; Cooley on Torts, 562; *Hoke v. St. Louis, etc., Ry. Co.*, 11 Mo. App. 574; *Keystone Bridge Co. v. New-*

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berry, 96 Pa. St. 246; 42 Am. Rep. 543; *Blake v. Railroad*, 70 Me. 60; 35 Am. Rep. 297; *McDermott v. Boston*, 133 Mass. 349; *Kelly v. Norcross*, 121 Mass. 508; *Summersell v. Fish*, 117 Mass. 312; *O'Connor v. Roberts*, 120 Mass. 227; *Brown v. Winsna, etc., Ry. Co.*, 27 Minn. 162; 38 Am. Rep. 285; *Walker v. Boston, etc., Railroad*, 128 Mass. 8. (g) The eighth instruction asked by the defendant should have been given. The issue tendered by the petition was that plaintiff was wholly unaware that the scaffolding was unsafe. The theory of the court below was, as shown in the refusal of this eighth instruction, that the plaintiff had to have actual knowledge of the want of safety of the scaffold, and why it was unsafe, that is, the defect that rendered it unsafe. "Absolute knowledge in the strict sense of the term, imports so high a degree of certainty as to the matter to be established that to require it in every instance would render the adjustment of differences between man and man on any just basis, practically impossible." Wade on Notice, p. 3, sec. 3.

Warner & Tichenor for respondent.

(1) "If there are special risks in an employment of which the employe is not, from the nature of the work, cognizant, or which are not patent in the work, it is the duty of the employer specially to notify him of such risks, and on failure of such notice, if he is hurt by the exposure to such risks, he is entitled to recover from the employer." Whar. on Neg., sec. 206. "It is his duty to give the employe a place where he can work free from danger, of which he has not notice. *Ib.*, sec. 209; *Elliott v. Railroad*, 67 Mo. 272, and cases cited in opinion; *Whalen v. The Cen. Church*, 62 Mo. 326. (2) It was not required of plaintiff that he should have looked for defects in the scaffolding. *Porter v. Railroad*, 60 Mo. 160; *Dale v. Railroad*, 63 Mo. 460. (3) The foreman was not a fellow servant with plaintiff. *Hall v. Rail-*

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road, 74 Mo. 298, and cases cited in opinion; *Whalen v. The Cen. Church*, *supra*. (4) In any event the duty as to the master furnishing proper machinery is so far personal that responsibility for injuries directly caused by the negligent discharge of it, exists although the master may for his own convenience act through other servants. *Long v. Railroad*, 65 Mo. 229; *Lewis, Adm'r, v. Railroad*, 59 Mo. 495; *Gibson v. Railroad*, 46 Mo. 163; *Dillon v. Railroad*, 3 Dillon, 323, and note page 327; *Gilman v. Railroad*, 13 Allen, 44, and cases cited; *Lancing v. Railroad*, 49 N. Y. 521; *Packet Co. v. McCune*, 17 Wall. 508. (5) The law presumes plaintiff was in the exercise of ordinary care at the time he was hurt, *Buesching v. The St. Louis Gas Light Co.*, 73 Mo. 229, and whether a person injured by the negligence of another who was exercising ordinary care, is a question to be determined by the jury either where the facts are disputed or where there is a dispute or reasonable doubt as to the inferences to be drawn from undisputed facts. *Vogel v. Railroad*, 75 Mo. 665; *Frick v. Railroad*, 75 Mo. 690; *Buesching v. The St. Louis Gas Light Company*, *supra*.

Silver & Brown and *Thos. T. Crittenden* for respondent on re-hearing.

(1) The authorities cited by the learned judge in support of his opinion we submit do not sustain him. They, and their cognates, will be found, on examination, to range themselves under one or the other of the following heads: (a) Where the instruction criticised undertook to present the whole ground of recovery while it failed to hypothecate all the facts embraced in the issues necessary to make out plaintiff's *prima facie* case. (b) Where the instruction omitting the whole of the facts in issue directs a verdict, and there are no other

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instructions given presenting the issuable facts to the consideration of the jury. (c) Where the instruction given misstates the law, and the party then undertakes to cure the defect by giving another correct declaration of law. In *Goetz v. Railroad*, 50 Mo. 472, Judge Bliss draws the distinction sharply: "An instruction in itself erroneous cannot be supplied by another. One that gives a part of the case may be, but there should be no contradiction." Now, in plaintiff's first instruction, there was no misstatement of any legal proposition. It properly declared the law as applicable to the facts predicated. It was good law as applied to plaintiff's *prima facie* case, and the other instructions given simply told the jury, that although they might find the facts to exist stated in the first instruction, yet if they found that the plaintiff was himself negligent as well as the defendant, he could not recover. So in *Raysdon v. Trumbo*, 52 Mo. 38, only a part of the facts in issue were presented in any of the instructions given. The court cites *Chappell v. Allen*, 33 Mo. 213, in which Wagner, J., p. 222, expressly says: "The error complained of was not cured by any counter instruction given on the other side." *Sawyer v. Railroad*, 37 Mo. 240, does not support the opinion at bar. The observation of the court, page 233, clearly shows that, although the plaintiff had omitted to predicate in his instruction the right of recovery on the whole of the evidence or issue, yet if defendant's side of the case had been fully presented in other instructions there would have been no reversible error. So the same thing is true of *Clark v. Hammerle*, 27 Mo. 55. In that case defendant sought to defend his possession of the land in question, on the ground of its abandonment by plaintiff or those through whom he claimed; plaintiff's instruction did not present this defence, and defendant's instructions as to same were not given. Says Judge Scott in his opinion, 27 Mo. 71, "the

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defendants being so unfortunate as to have all their instructions on the question of abandonment rejected by the court, the court was not, therefore, warranted in putting the case to the jury in such a way as would exclude the consideration of the effect of the evidence given by them on the subject of abandonment." In *Goetz v. Railroad*, 50 Mo. 472, plaintiff's instruction failed to hypothesize a fact essential to make out his *prima facie* case. In *Iron Mountain Bank v. Murdock*, 62 Mo. 70, Judge Sherwood, who delivered the opinion of the court, expressly says: "And this lack in the instruction was not supplied by any others." In *Henry v. Basset*, 75 Mo. 89, none of the instructions presented properly the issue of abandonment of the contract involved in that case. (2) It has been the uniform ruling of this court that when a series of instructions taken together contain a correct exposition of the law, it is sufficient, and that this is so although the instructions taken separately may be objectionable. *Williams v. VanMeter*, 8 Mo. 342; *Pond v. Wyman*, 15 Mo. 175; *Gamache v. Piquignot*, 17 Mo. 310; *State v. McClure*, 25 Mo. 338; *Galena & Co. v. Vandergrift*, 34 Mo. 62; *Kennedy v. Railroad*, 36 Mo. 351; *Moore v. Sinbosin*, 42 Mo. 490; *McKeon v. Railroad*, 43 Mo. 405; *Marshall v. Fire Insurance Co.*, 43 Mo. 536; *Sears v. Wall*, 49 Mo. 359; *Thompson v. Railroad*, 51 Mo. 190; *Budd v. Hoffheimer*, 52 Mo. 297; *Porter v. Harrison*, 52 Mo. 524; *Loyd v. Railroad*, 53 Mo. 509; *Karle v. Railroad*, 55 Mo. 476; *Clements v. Maloney*, 55 Mo. 352; *Henschen v. O'Bannon*, 56 Mo. 291; *Meyer v. Railroad*, 59 Mo. 223; *Kitchen v. Railroad*, 59 Mo. 514; *Whalen v. Railroad*, 60 Mo. 323; *Edwards v. Carey*, 60 Mo. 572; *State v. Moore*, 61 Mo. 276; *Krech v. Railroad*, 64 Mo. 172; *Tate v. Railroad*, 64 Mo. 152; *Nelson v. Foster*, 66 Mo. 381; *Parton v. McAdoo*, 68 Mo. 327; *Brown v. Insurance Co.*, 68 Mo. 133; *Wilson v. Railroad*, 71 Mo. 203; *Buesching v.*

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Gas Light Co., 73 Mo. 219; *State v. McGinnis*, 76 Mo. 326. (3) The same rule prevails in criminal cases where the life and liberty of the citizen is at issue. *State v. McClure*, 25 Mo. 338; *State v. McGinnis*, 76 Mo. 326, *People v. Doyell*, 48 Cal. 93; *People v. Morine*, 61 Cal. 372. (4) In plaintiff's first instruction, there was no misstatement of any legal proposition. It properly declared the law as applicable to the facts predicated. It was good law as applied to plaintiff's *prima facie* case. This identical question has been twice passed upon by this court favorably to respondent. *McKeon v. Railroad*, 43 Mo. 405; *Karle v. Railroad*, 55 Mo. 476; see; also, to same effect, *Kennedy v. Railroad*, 36 Mo. 351; *Whalen v. Railroad*, 60 Mo. 327. (5) Contributory negligence in this state is a matter of affirmative defence. *Thompson v. Railroad*, 51 Mo. 190; *Loyd v. Railroad*, 53 Mo. 509; *Buesching v. Gas Light Co.*, 73 Mo. 219. It being a matter of defence, the plaintiff is not called upon to invoke it in his instructions in behalf of defendant. (6) The defendant itself tried the case on the theory that knowledge of the defect in the scaffolding was a bar to a recovery, and it has nothing to complain of in this court. *Crutchfield v. Railroad*, 64 Mo. 255; *Leabo v. Goode*, 67 Mo. 126.

RAY, J.—This is an action for damages, for personal injuries sustained by the plaintiff, who is a carpenter, and who was engaged, at the time, with other carpenters, under a foreman named Prather, in taking down an ice house for defendant, in Kansas City, Missouri. The petition charges that, in order to take off the roof of said ice house, defendant furnished for plaintiff, and his fellow workmen, scaffolding which consisted of planks, placed upon tie beams. That said scaffolding was defective, insufficient and insecure, and improperly constructed; that it was constructed of planks that were too

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short, and that the plank rested on a tie beam, in which there was a large knot, which rendered it weak and unfit for the support of the scaffold, and that, on account of such weakness, a part of said tie beam, upon one end of which said scaffold rested, fell down, leaving one end of the scaffold without support. That defendant knew of the defect in the beam, and of the unsafe and dangerous condition of the scaffold, and failed to provide against said defects, and failed to notify plaintiff of the same, but suffered him, while wholly unaware of danger, to step upon the scaffolding, which immediately gave way and precipitated him to the ground, etc. The answer was a general denial, and, also, a plea of contributory negligence on the part of the plaintiff, which was denied generally in the plaintiff's replication. The carpenters began the work of taking down the ice house about seven o'clock in the morning of February 18, 1878. In the division of the work, it seems that the plaintiff and two of the others went on to the roof to saw the same in sections, while Prather and the rest went inside the building to fix the uprights and staving. During the forenoon, and about ten o'clock, something was heard to crack, and the foreman, Prather, who was then on the roof with Sullivan, after ascertaining the condition of the tie beam, had a section of the roof (the first one, perhaps, that had been sawed out) let down and placed over it, so that the section lay over it as a scaffold. Plaintiff, as well as the others, assisted in letting down the section, and it remained there during the day, until all the other sections that had been sawed out, except one or two, perhaps, had been taken down. While the carpenters were engaged, about three o'clock in the afternoon, in removing the said section which had been let down in the morning to cover the tie beam that had the knot hole, and had cracked, the plaintiff stepped onto a part of the defective beam, and was immediately thrown down and suffered severe

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and permanent injuries. Such portions of the evidence as we deem material will be noticed hereafter.

As to the instructions given for the plaintiff, we may say that the second, which relates solely to the question whether Prather, the foreman, was a fellow servant or representative of the defendant; and the fourth, which relates to the measure of damages, are, in the view we have taken of the case, immaterial, and are, therefore, omitted. The first and third are as follows:

"1. The jury are instructed that if you believe, from the evidence, that in the ice house in question the tie beam ran from one side of the building to the other, and consisted of two pieces of timber, or lumber, which were spliced or beamed together at the middle of the building, and that defendant, in order to take off the roof of said house, furnished plaintiff and his fellow workmen scaffolding, which consisted of planks placed upon said tie beams, and that said scaffolding was defective, insufficient and insecure, and by being so constructed that the plank rested upon a tie beam in which was a large knot which rendered it weak, and which was not fitted for the support of a scaffold, and that by reason of said weakness a part of said tie beam, upon one end of which said scaffold rested, gave way and fell down, leaving one end of said scaffolding wholly without support and in a dangerous condition, and that the foreman of defendant knew of said tie beam being in such a weak and insecure position, and that he knew it had become cracked, broken and unsafe, and that he knew of all said facts for such a length of time before the happening of the injury in question, that he could have, by the exercise of ordinary care and prudence, remedied said defect, and thereby prevented the injury, then you can find for the plaintiff."

"3. The jury are instructed that, while it is true
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that if plaintiff was aware of the defect in the scaffolding in question, and that said defect was so glaringly defective that a man of common prudence, or common sense, would not have gone upon the same, then he cannot recover; yet, you are further instructed that if plaintiff did not know of the dangerous character of said defect, and that the foreman of defendant did know of it, and did make any statement in the hearing of plaintiff, to the effect that the defect in the tie beam was not unsafe or dangerous, and that plaintiff relied upon the same, then plaintiff was not guilty of such contributory negligence as will preclude a recovery on part of plaintiff, providing you believe plaintiff was directed by said foreman to do the work which obliged him to go upon said scaffolding."

It is not necessary, we think, to set out in this case defendant's instructions, given or refused. The plaintiff had a verdict for seven thousand dollars upon which judgment was duly entered, and defendant appealed the cause to this court.

It will be observed that the condition of the tie beam and scaffolding, whether the same were weak and broken, defective, insecure and dangerous, and, also, the knowledge of the foreman in relation thereto, are all properly submitted to the jury in the first instruction, and there was ample evidence showing, or tending to show, the facts thus submitted, but the contributory negligence of plaintiff, which was set up in the answer, and his knowledge, if any, of the defective and dangerous condition of the tie beam and scaffold, which was within the issues made, as to whether or not he "stepped on the tie beam wholly unaware of danger," and entirely ignored by this instruction, and a verdict authorized for plaintiff without regard thereto. Upon the trial, the plaintiff testified, on cross-examination, among other things, as follows:

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Q. "There were planks laid along there on the tie beams?" A. "I don't know. I stopped right there; that is, over this broken tie beam." Q. "You did not know what it was that was broken; when did the foreman tell you this?" A. "Before it broke. He said there is a knot there, but he thought it was safe." Q. "He told you before this fall that it was broke, but he thought it was safe?" A. "Yes sir." Q. "You heard this before you went on it, did you?" A. "Yes, sir." * * * Q. "How long before the fall did you hear him say this about this knot-hole?" A. "Some four hours before that. That was the first section we took down." Q. "How came it you laid this section down and left it and took down the others first?" A. "The foreman told us something cracked about ten o'clock. The foreman went down and satisfied himself that something was unsafe. He said some of the men said it had to be repaired. He said to let down that section of roof and make a staging of it." * * * Q. "Now I want to ask you if the foreman did not state that he let the staging down there to cover the defect, to keep from getting on this defect?" A. "He went down and saw this, and we did not know the extent of the break. He went down and looked at it, and saw it and said there was a bad place. He had seen it before, but he did not think it would break. He said some of the men spoke to him about fixing it, and he said it was not necessary, the section could be let down and cover it."

The witness Spees, introduced by plaintiff, testifies: Q. "Do you know what time of day this crack occurred in this tie beam?" A. "I couldn't tell about the time it occurred. I noticed it some little time before we commenced moving the section. I think I called the foreman's attention to it. I told him we had better put something on it to make it more secure. I did not think

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it was safe for men to go on. I told him I would not go on; I don't know whether I told the foreman I wouldn't go on." And on cross-examination as follows: Q. "You recognized the statement as being true at the time you signed it?" A. "Yes, sir." Q. "No one asked you to put anything on there that wasn't true?" A. "I suppose all the men knew this was broken. They were not all present when I spoke about this." Q. "At the time, I understand, he knew about it?" A. "I don't know whether he knew or not. The idea is, I am particular about going on staging, and caution my men." Q. "If Sullivan had been as prudent as you, he could have seen it." A. "He could certainly, if he had gone below."

"The statement" referred to was one made out by Prather the day after the accident, and signed by him and the plaintiff's witnesses, Flint and Spees, as well as the other carpenters, except plaintiff. The said witnesses were questioned about it by the plaintiff's counsel, and the circumstances under which it was signed and the purpose of it were detailed in their evidence. It was afterwards introduced in evidence by the defendant. Among other things it says "that all the men were told and saw for themselves that the piece beneath the section of the roof was broken and unsafe to stand on, and when this section was moved, Mr. Sullivan unthoughtedly stepped on the broken piece and fell." Prather, introduced by defendant, testifies upon the point: Q. "What was said about that broken tie beam?" A. "There was nothing more said until we got on the building. That was probably ten o'clock, when we let down that section of roof, and broke this (shows). It was said we would let the section of roof down, and let it remain for a staging over that defective beam. That was the purpose. I think every one present knew it. They were all present letting down that sec-

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tion of roof and leaving it there." Q. "State what occurred just before the accident happened. Where was Sullivan standing then, with reference to the section of roof?" A. (Shows on diagram where Sullivan was standing). Q. "State whether or not it was necessary for him to go out there for the purpose of removing this roof." A. "There was no necessity for his going out there at all." Q. "That tie beam was so defective that you think they all talked about it." A. "We all talked about it." Q. "Didn't you say 'I think everybody there talked about the beam?'" A. "We all talked about it." Q. "You state that Mr. Flint spoke to you; state whether Mr. Spees and Mr. Sullivan could have heard what was said between you?" A. "Yes sir, they could." Q. "Were they as near to him as you were?" A. "They were nearer to him."

We do not undertake to pass upon the probative force and value of the foregoing evidence as against other statements and evidence to the contrary in the record; but it is clear, we think, that the same is legitimate and competent under the issues made and involved, and was admitted and received in evidence, as such and for that reason. But it is also equally clear, we think, that the defendant may have been and was prejudicially deprived of its benefits; because, under said first instruction, said evidence, which constituted the defence, was, in effect, excluded from the consideration of the jury. They were, as already stated, upon a finding as to the character and condition of the materials furnished and used by defendant, and the foreman's knowledge thereof and conduct in relation thereto, which were the only questions submitted, authorized by this instruction to find the issues for the plaintiff without being thereby further required to pass upon and consider the conduct of the plaintiff in the premises, and the plaintiff's knowledge, if any, of the broken tie

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beam and the unsafe and dangerous condition of the scaffolding. We do not think a conclusion upon the whole case was, under the issues and evidence, authorized by a finding as to the facts thus submitted. *Gilson v. The Jackson Co. Horse Ry. Co.*, 76 Mo. 282; *Fitzgerald v. Hayward*, 50 Mo. 516; *Sawyer v. Railroad*, 37 Mo. 240; *Clark v. Hammerle*, 27 Mo. 55.

While instructions are to be considered in their entirety and as a whole; yet each instruction must be correct in itself so far as it goes, and where it attempts to cover the entire case and contains such a vice as we have pointed out, it cannot be cured by other correct instructions given in the cause. Under the direction of this instruction the jury could, and may have proceeded to make the verdict, without regard to the other instructions or the facts submitted therein, and this is, we think, under our previous decisions, prejudicial error. *Thomas v. Babb*, 45 Mo. 384; *Goetz v. Railroad*, 50 Mo. 472; *Singer Co. v. Hudson*, 4 Mo. App. 145; *Henry v. Bassett*, 75 Mo. 89; *Bank v. Murdock*, 62 Mo. 70, 73, and cases cited.

For these reasons the judgment of the trial court is reversed and the cause remanded. All concur, except Norton and Black, JJ., who dissent.

On re-hearing.

RAY, J.—This case, on a motion for re-hearing, has been argued the second time, and we are earnestly asked to recede from the ruling heretofore made; and in support thereof numerous authorities have been cited and urgently pressed upon our attention, as establishing a doctrine directly the reverse of the one announced in the opinion heretofore delivered. It is not pretended that the ruling already made is not supported by the authorities cited and relied upon in that opinion; but it is

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insisted, that it is in direct conflict with other controlling decisions of this court, to which our attention was not called through inadvertence of counsel, and which it is claimed assert the correct doctrine upon the question involved. These decisions are cited in the brief of counsel. It may be conceded in the outset, that some few of them do assert a contrary doctrine, of which the cases of *McKeon v. Railway Co.*, 43 Mo. 405; *Karle v. Ry. Co.*, 55 Mo. 476 and *Whalen v. Ry. Co.*, 60 Mo. 327-8, are types; and it may also be conceded that many others (not altogether analogous to the case at bar) assert in general terms, that "when instructions are given, although taken separately each might be exceptionable; yet, if taken as a whole, they contain a correct exposition of the law of the case, the judgment will not be reversed." Of this class, the case of *Williams v. Vanmeter*, 8 Mo. 342; *Pond v. Wyman*, 15 Mo. 175, and others, are types. While the want of uniformity as well as actual conflict, apparent in our decisions, on this point, is greatly to be regretted, the question still recurs which class of rulings is best supported by principle and authority and will best subserve the ends of justice, that adopted in the original opinion herein; or that to which we are asked to conform our ruling by the counsel for plaintiff. In the class of cases relied on by plaintiff, where it is held "that the error or defect of one instruction may be cured or supplied by another," it will be seen, upon inspection, that the statement is qualified by the proviso, that the two instructions must not be inconsistent or misleading. 6 Mo. 323, and 50 Mo. 482, *supra*. It will also be seen that the doctrine has more frequently been applied to a class of cases, where the errors condoned were less glaring and dangerous than the one condemned in the case at bar.

The general doctrine on this subject is well stated in the case of *Thomas v. Babb*, 45 Mo. 384, where it is,

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in effect, held that "an instruction which hypothecates a state of facts and upon their existence directs a verdict, is improper unless all the facts are hypothecated which are necessary to sustain a verdict." Also, "that each instruction as far as it goes, should be correct in itself; all must be consistent with each other and the whole taken together must present but one doctrine." That the instruction in question is vicious and objectionable and ought never to have been given, is conceded. But the controversy is as to the degree of this vice, on the one hand claimed to be curable, and on the other said to be wholly indefensible and incurable. The first instruction submits the facts relied on by plaintiff and if the jury believe them proved, then they have been authorized by the court to find the verdict in his favor. And the authority to find such verdict in that event, is tantamount to a direction to do so. In effect, if not in terms, the court declares that if the submitted facts are proved the law entitles the plaintiff to their verdict, and if this is so it is their duty to so find, and they can do so. Why should they consider or determine any other facts, otherwise submitted, in other instructions. They have the court's declaration that this is the whole case, which is thus put before them in one instruction. If other instructions require further findings of the facts they are manifestly two rules for the guidance of the jury, either of which they may follow, but their general verdict would not disclose which. All the instructions, it is true, are read to the jury, and they must suppose that they are all for their consideration and guidance, but this purpose may be defeated by a single defective instruction of this kind. It purports to cover the entire case, and authorizes a verdict; the whole series of instructions can do no more. Nor is the view we hold in this behalf any reflection upon the intelligence of the jury in their province as triers of the fact. The primary

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idea in our law, in this behalf, is that the jury are presumed not to be learned in the law, and are to be instructed by the court as to the law, upon the various supposed states of facts submitted.

After a general verdict for the party, in whose behalf an error like this has been committed, there can be, we fear, no means of knowing that the jury have modified and corrected such an instruction, by disregarding its authority to make up their verdict thereon, which is, in effect, the claim of plaintiff, and besides, in so doing, they would be burdened with a duty which the law imposes on the court, and the whole theory of the law, upon which instructions are authorized or required, would be thereby reversed. The rule announced in many of the decisions that instructions should be considered in their combination and entirety, and that if correct in the whole as an exposition of the law of the case, the judgment should not be reversed, although a particular instruction may not be right or may be defective or erroneous, is in principle, we think, not applicable to the case at bar. Conceding the correctness and propriety of the rule, it is inapplicable when the particular instruction, though objectionable, directs no finding and, when, under the modification of the other instructions, which as a whole are correct it may be justly presumed to be harmless and without prejudice; but on principle cannot, we think, be fairly applied, when, as in this case, the instruction is based exclusively on the evidence offered by and favorable to one party, and ignores that of the other and directs a conclusion to be drawn therefrom in favor of the one whose evidence is submitted, and against the other whose evidence is excluded. Such an instruction is not a particular instruction, applicable to some facts or part of the case, but a general one and as comprehensive as the series, because it purports to embrace all the facts

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necessary to a finding and directs a verdict. It does not simply form a part of the series because it is entire and complete in itself. It is one whole charge and complete exposition of the law of the case, and contains no reference to any other instruction, or to the plea of the defendant, or the evidence in support of it. Where such is the character and extent of authority in any one instruction, the series of instructions taken all together cannot be regarded as consistent and harmonious and as presenting one doctrine.

And further the supposed harmlessness of the first instruction is based, we think, on an assumption that as the jury must be supposed to have given proper consideration to the instructions taken as a whole, they have in so doing modified and disregarded the authority of said first instruction to make a finding, although they may have believed that the facts submitted to them therein had been fully proved. But where there is a general verdict there is, as we have before stated, no means of knowing whether this is so or not, as the verdict is in conformity with and not against the law as declared in the first instruction, which purports to submit all the material facts and authorizes a verdict and finding thereon.

In addition to cases cited in the original opinion, we add the following from our own adjudications, that of *Jones v. Talbot*, 4 Mo. 279, where it is held that, "Where erroneous instructions are given for one party, the error is not cured by giving for the other party instructions, explanatory or contradictory to those first given. The erroneous instructions should be expressly withdrawn from the jury." In the case of *Hickman v. Griffin*, 6 Mo. 37, the court say that, "Where the circuit court gives erroneous instructions, the error is not cured by the fact that correct instructions accompanied them, as such erroneous instructions may mislead the jury." See also *Clay v. Railroad*, 17 Mo. App. 629, and *State*

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v. McNally, 87 Mo. 644. We also append the following cases from the Illinois court in support of our own ruling, viz: *Ry. Co. v. Harwood*, 80 Ill. 91, where the court say, "The instruction asserted a right of recovery, under the circumstances named in it, without containing the requirement of any care or caution on the part of the deceased. In this, the instruction is manifestly wrong. And although other instructions given did contain such requirement, that did not cure the error. It left the jury at liberty to select and act upon either instruction, as might strike them as being most proper." In the case of *Ry. Co. v. Dimick, Adm'r*, 96 Ill. 47, the court uses this language: "An instruction almost identical with the above was condemned in *Ry. Co. v. Harwood*, 80 Ill. 83. It may be said that the defendant's instruction gave the law on this subject accurately to the jury, but that is not enough. Where a case is close in its facts, the instructions should state all the law accurately. The jury, not being judges of law, are as likely to follow a bad instruction as a good one." In the case of *North Chicago Rolling Mills Co. v. Morrissey, Adm'r*, 18 A. & E. Ry. Cases, 48, this language is used by the Illinois court: "The question of contributory negligence was raised and was a very important one in the case. This instruction entirely ignores the question of contributory negligence. It purports to be complete in its statement of what will authorize a recovery, and omits the requirement of any care or caution on the part of the deceased. In this respect the instruction is erroneous, as we have heretofore repeatedly held," citing the above cases. We have cited and quoted from the above cases, because of their similarity to the one at bar and because they are in exact harmony with the ruling in this case, as well as many others of this court, cited in this and the original opinion herein. We might multiply citations and quotations from other courts to the same effect, but it is deemed unnecessary. After a care-

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ful reconsideration of this question and an examination of the authorities cited, we feel constrained to adhere to the ruling heretofore made in the original opinion, both as being the better practice, sounder in principle and better supported by authority.

We may add that as upon a re-trial of the case the facts may or may not be the same, as important and material modifications therein may occur, we deem it not advisable to now pass on and decide other questions which have been argued before us, the decision of which would not change the result. But the question, who are fellow servants has recently been before this court and our latest adjudications in that behalf have been announced since the trial and submission of this case and reference to them may now be made, for the direction of the trial court and parties so far as the principle and rule declared may be applicable to the facts of this case, upon a re-trial thereof. See *Moore v. Railroad*, 85 Mo. 588; *McDermott v. Railroad*, 87 Mo. 235, and *Covey v. Railroad*, 86 Mo. 635.

For these reasons the judgment of the trial court, as heretofore ruled, is reversed and the cause remanded. In this opinion Judges Henry and Sherwood concur, and Norton and Black, JJ., dissent.

BLACK, J., DISSENTING.—I dissent from the majority opinion in this cause, because I regard it opposed to a long line of decisions in this state, which have been collected by the industry of counsel, and will be found in their briefs. To my mind the ruling is extremely technical, and I entertain the belief it cannot and ought not to stand the test of time. No objection is made to the entire series of instructions given at the request of the plaintiff, except the first, and to that only because it fails to make mention of the defence of contributory negligence. On this instruction the majority opinion says: "Why should they (the jurors) consider or de-

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termine any other facts, otherwise submitted in other instructions? They have the court's declarations that this is the whole case which is thus put before them in one instruction." Can it be said the whole case is put before the jurors in the one instruction? Turn now to the instructions, and of those given at the request of the plaintiff, the second relates to such facts as will make Prather a vice-principal. The third in plain terms tells the jury, that if the plaintiff was aware of the defect in the scaffolding, and if the defect was such that a man of common prudence would not have gone upon the same, then he cannot recover; but if he did not know of the dangerous defect and the foreman did, and stated that the tie beam was not unsafe, and plaintiff relied upon that statement, then he was not guilty of contributory negligence, which would preclude a recovery. For the defendant, the court, in substance and legal effect, told the jury that it devolved upon the plaintiff to prove that his injuries resulted solely from negligence of the defendant, and that he must further show by a preponderance of the evidence that he did not know the scaffold was unsafe, "and unless he has established each of these facts by a preponderance of the evidence, the verdict must be for the defendant." Again, if the accident happened in consequence of the combined negligence of Prather, in not strengthening the tie beam, and of plaintiff in stepping upon the same, "then the jury must find for the defendant." Many other instructions were also given, all to the effect that plaintiff could not recover, and the verdict should be for the defendant if plaintiff was wanting in care.

Now, I repeat, how can it be said the whole case was put before the jurors in the first instruction, when the third concedes in plain terms that certain other facts, if true as alleged, would defeat a recovery? The plaintiff, according to the practice in this state, after the evidence was all in, and before the facts were argued be-

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fore the jury, asked, had given, and read to the jury these instructions, by the third of which, he, in unequivocal language, concedes he cannot recover if guilty of contributory negligence. Is this admission, and are all of these instructions, given at the request of the defendant, to go for naught? Must an admission, once so fully made, be repeated in every instruction, for fear it may escape the attention of the triers of fact? Day after day judgments are affirmed over instructions which, if they stood alone, would be held to be erroneous; yet, we take the whole series in their combination and say they fairly present the law. This is not a rule to be applied when the cause is to be affirmed and disregarded on all other occasions. It is true the jury must take the law from the court, but the court does not instruct them by way of giving abstract propositions. As was done in this case, they are told what their verdict must be on a given state of facts, and what it must be on other or additional facts. Instructions of this character are quite as well understood by the jurors as by court and counsel. No advocate, it is believed, would say of these instructions that plaintiff could recover regardless of the question of care on his part. The court, openly, and the jurors in their minds, would have made haste to refute any such assertion. That no such claim was made in this case, until the cause reached this court, is clear enough.

I am unable to see the conflict in the opinions of this court, which is lamented in the majority opinion. Some confusion may arise by taking extracts here and there, detached from the subject matter, and entire features of the case under consideration, just as does in considering one instruction independently of the others. The rule is well enough stated in *Thomas v. Babb*, 45 Mo. 384; but it will be seen the instruction was not condemned because it failed to state all the issues, but because it did not recite facts sufficient to make a defence. Norton, J., concurs.

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BANK OF PIKE COUNTY, *Appellant*, v. MURRAY *et al.*

Practice in Supreme Court. In an equity case the Supreme Court will defer somewhat to the finding of facts of the trial court.

Appeal from Hannibal Court of Common Pleas.—HON. THEODORE BRACE, Judge.

AFFIRMED.

W. H. Biggs and D. H. McIntyre for appellant.

(1) The evidence clearly establishes the fact that Murray, in conveying his large estate to Luce, acted fraudulently, and with intent to hinder, delay, or defraud his creditors. The decree of the court is against the preponderance of evidence on this issue. In chancery cases this court will review the testimony upon which the decree is based and reverse or modify the judgment, if it is manifest that the judgment should have been otherwise. *Judy v. Farmers & Traders Bank*, 81 Mo. 404. (2) Law and justice recognize the equitable and equal interest of all ordinary creditors in the property of the debtor. When one creditor takes the property of an insolvent debtor in payment of his debts, it must appear that the fair market price of the property was allowed, and it must also appear that the grantee acted *bona fide*, that is, without notice of the fraudulent intention [if any] of the grantor to hinder or delay his other creditors. But actual knowledge by the grantee is not necessary. Facts and circumstances sufficient to put a prudent man on inquiry are sufficient. *Bump on Fraud. Con.* (2 Ed.) 200, and cases cited. It is not necessary that the design of the grantee be to defraud the creditors of the grantor. If he has notice at the time of the transfer of the fraudulent intentions of

the grantor, this makes him a *mala fide* purchaser. *Edgell v. Lowell*, 4 Vt. 405; *Fuller v. Sears*, 5 Vt. 527. Luce was Murray's father-in-law, their business relations were of the most intimate character, and under such circumstances it should require but little testimony to prove that Murray's intentions were known to Luce. *Carter v. Illies*, 22 Tex. 479. Murray was Luce's agent, and transacted all his business. If Murray's intentions in conveying his property to Luce were fraudulent, then Luce cannot shield or protect himself against the demands of Murray's creditors upon the grounds that he was not aware of his intentions. If Murray acted for both, then his fraudulent purposes or intentions vitiated or tainted the transactions between the two. Bump on Fraud. Con. (2 Ed.) 203; *White v. Graves*, 7 J. J. Marsh. 523; *Wiley v. Knight*, 27 Ala. 336; *Pope v. Pope*, 40 Miss. 516; *Bobb v. Woodward*, 50 Mo. 95; *Clark v. Fuller*, 39 Conn. 238. (3) The decree finds an absolute assignment of the VanHorn notes to Luce. This finding is clearly against the evidence. Murray said the notes were assigned as collateral to secure Luce in what he owed him. If the notes were held by Luce as collateral, then his purchase of block thirteen in October, 1878, enured to Murray's use, because at the time of the sale Murray owed Luce nothing, Luce held the property as trustee for Murray, and the appellant, as a judgment creditor of Murray, had a right to have the property in the hands of Luce subjected to the payment of its judgment. (4) Appellant's objection to the reading of the depositions of James Alexander, B. F. Miller and John T. Rule, should have been sustained; the question was the value of the mill at the time of the transfer, to-wit: in November, 1876, and not as to its value in 1881. (5) What Murray testified to in his deposition in 1874, in reference to the judgment of P. F. Lonergan against Wm. M. VanHorn and himself, was competent. It was VanHorn's debt and

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Murray was security. If the judgment could have been collected by Luce from VanHorn's estate, then there was no necessity for, or good reason why Murray should convey to Luce his individual property in payment of the judgment. The testimony has a tendency to throw some light on the character of the transactions between Murray and Luce—that is, whether *bona fide* or otherwise.

Smith & Krauthoff and *W. P. Harrison* for respondents.

(1) The amended petition should have been stricken out, as it was an entire change of the original cause of action. *Lumpkin v. Collier*, 69 Mo. 170; *Fields v. Maloney*, 78 Mo. 172; *Parker v. Rodes*, 79 Mo. 88. All facts stated in an amended pleading must exist at the bringing of the suit. 4 Wait's Prac., 467; *McCaslan v. Latimer*, 17 S. C. 123; *Hornfager v. Hornfager*, 6 How. Pr. 13; *Drought v. Curtiss*, 8 How. Pr. 56; *Stafford v. Howlett*, 1 Paige, 200; 3 Roberts, 621; 15 Cal. 308. (2) A debtor has the right to prefer one creditor over another. *Sibly v. Hood*, 3 Mo. 290; *Chouteau v. Sherman*, 11 Mo. 385; *Murray v. Cason*, 15 Mo. 378; *Kuykendall v. McDonald*, 15 Mo. 416; *Dougherty v. Cooper*, 77 Mo. 528; Bump on Fraud. Convey. (3 Ed.) 183-4, *et seq.* (3) That Luce was Murray's father-in-law does not affect the question if the indebtedness to the former was *bona fide*. (4) The fact that Murray expected Luce, and the latter had expressed a purpose to settle the property paid on the former's wife, or that the preference would enure to the benefit of his wife, or of his family, does not make the transfer fraudulent. *Young v. Stallings*, 5 B. Mon. 309; *Cruetson v. Doby*, 10 Rich. Eq. 414; Bump on Fraud. Convey. (3 Ed.) 190. (5) The creditors of Murray have no right to complain of what Luce did with the property conveyed to him.

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It was his own and he had the right to make any disposition of it he pleased. *Young v. Dumas*, 39 Ala. 60; *Winch v. James*, 68 Pa. St. 297; Bump on Fraud. Convey. 193. (6) Nor is it material to inquire what Murray's secret motives were in preferring Luce. *Crawford v. Austin*, 34 Md. 49; *Young v. Dumas*, 39 Ala. 60; *Winch v. James*, 68 Pa. St. 297. (7) Although this is an equity case, yet unless the findings of the trial court are clearly wrong, they will not be disturbed. *Chapman v. McElrath*, 77 Mo. 38; *Hendricks v. Wood*, 79 Mo. 590; *Judy v. Bank*, 81 Mo. 404; *Bushong v. Taylor*, 82 Mo. 660.

HENRY, C. J.—By this action, plaintiff seeks to subject to the payment of a judgment in its favor against Murray, a parcel of ground in the city of Louisiana, the legal title to which is held by Luce, who purchased it at a sale by a trustee to whom it had been conveyed by one Van Horn to secure a debt of eighteen thousand dollars, owing by him to Murray, evidenced by promissory notes, which it is alleged were by Murray assigned to Luce in fraud of his creditors. On a hearing of the cause the bill was dismissed, and plaintiff has prosecuted this appeal. The judgment in favor of plaintiff against Murray was rendered in December, 1876, for \$4,744.95, and was the balance of an indebtedness of about fifteen thousand dollars of the firm of Whitney, Lonergan & Co., of which Murray was a member. The assignment of the Van Horn notes by Murray to Luce was made ten days before that judgment was rendered, and the sale of the block was made under the deed of trust in October, 1878, and purchased by Murray for Luce, his father-in-law. The evidence in the cause shows that Murray was largely indebted to Luce at the time of this assignment, and was, in effect, insolvent, owing to others considerable amounts.

The assignment of the notes against Van Horn was

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made in November, 1876. Murray had previously conveyed to Luce a store house, and one-half of mill property in Louisiana, for the consideration of five thousand dollars, and on the tenth of December, 1876, six hundred acres of land in Harrison county for thirteen hundred and fifty dollars, and three hundred and eighty acres in Vernon county for one thousand dollars. January 5, 1875, Murray sold some property in Chicago to Luce for eight thousand dollars, and an interest in property in Quincy at four thousand dollars, and other property which, estimated at prices placed upon it by plaintiff's attorney in his argument, aggregated \$36,111.00, which was about ten thousand dollars in excess of Murray's indebtedness to Luce, as testified to by Luce and Murray, and not contradicted, but corroborated to a considerable extent by the records of judgment in Luce's favor against Murray, and judgments against Murray in favor of other parties, assigned to Luce. The contention of appellant is, that the property conveyed by Murray to Luce was worth more than Luce paid for it, and for the purpose of showing that portions of it were sold to Luce at greatly less than their value, read from the testimony of Murray, in a cause theretofore pending in the Macon circuit court between Van Horn and Murray, involving the question of Murray's solvency, in which Murray placed the value of the land in Harrison county at three thousand dollars, and that in Vernon county at about three thousand and five hundred dollars, which he sold to Luce, the one tract for thirteen hundred and fifty dollars, and the other for one thousand dollars. The deposition was taken about two years before this cause was tried. No other testimony was offered by plaintiff to show that the land was worth more than the price paid by Luce, or to contradict the testimony of Murray that he had had the lands in the market for some time, and that he could get no more for them than Luce paid him. As to the other property,

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witnesses differed as to its value, some placing each parcel at one-half the value testified to by others.

A creditor receiving from his debtor property in payment of his debt, will avail himself of the opportunity growing out of the necessities of the debtor to get it at the lowest possible price. There is no such fixed value upon the character of property taken by Luce, as to enable a court or jury to determine, with anything like mathematical exactness, what the creditor has received in value, and while what the debtor may have said or sworn it was worth two years before may tend to prove a fraudulent intent on his part in making the conveyance, it is by no means conclusive on the purchaser as to its value at the date of the conveyance. And in considering the testimony of Murray, given in the case between him and Van Horn, the fact is not to be overlooked that he was deeply concerned to establish his solvency, nor is it to be forgotten that men nearly always overvalue their own possessions. In taking property in different parcels, in different localities and states, in payment of a *bona fide* debt due him, not one of a hundred creditors would accept it at anything near its actual cash value, and if such sales are to be set aside as fraudulent because a full cash value was not allowed the debtor for his property, but few of such transactions would be unimpeachable. I do not propose, in this opinion, to notice all the points made by the appellant's attorney, in his exceedingly able oral argument before us; but they have been duly considered, and a careful examination of the testimony forbids our interference with the judgment of the circuit court. The judge who tried the cause was more favorably situated than we, to determine the merits of this controversy on the testimony, and while we might think that the testimony would have warranted a different judgment, some deference is due to the opinion of the trial judge before whom most of the witnesses personally appeared and testified,

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and to whom they were probably personally known. In all such cases we decline to interfere with the judgment unless it is manifest that it should have been for the other party. The judgment is affirmed.

ADDIS *et al.* v. GRAHAM *et al.*, *Appellants.*

1. **Evidence : DEED : RECORD COPY : SEAL.** Where in the record copy of a deed offered in evidence the statement of the officer taking the acknowledgment that he affixed his seal appears in the body of his certificate, the presumption arises that his seal was attached thereto although no written scroll or seal was copied into the record by the officer recording the deed.
2. — : —. The recorder of deeds is not required to copy the seal of the officer who took the acknowledgment of the deed.
3. **Dower : INSUFFICIENT RELINQUISHMENT OF.** The insufficiency of the wife's relinquishment of dower contained in the acknowledgment of a deed is immaterial where such question of dower is not involved.
4. **Officers : PRESUMPTIONS AS TO ACTS OF.** Presumptions are in favor of the regularity of the acts of public officers, and this rule applied in this case to officers taking acknowledgment of deeds.
5. **Lost Deeds : SECONDARY EVIDENCE.** Where diligent search has been made in the proper places for deeds and they cannot be found, secondary evidence of their contents is admissible.
6. **Record Partly Destroyed : EVIDENCE.** Where a record is partly destroyed or lost, the part remaining should be introduced in evidence when it is sought to establish the contents of such record.
7. **Contents of Lost Deed : PAROL EVIDENCE.** Parol evidence is competent to show the contents of a lost or destroyed deed or record.
8. — : —. Where it is sought to show that certain lands were conveyed by such lost deed proof of the declarations of the grantor to that effect is admissible.
9. **Loss of Deed and Record : TITLE OF GRANTEE.** Where a deed

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is executed, acknowledged and recorded, the loss of the deed and destruction of its record, does not affect the title of the grantee.

Appeal from Barton Circuit Court.—HON. C. G. BURTON, Judge.

AFFIRMED.

Robinson & Harkless for appellants.

(1) The court erred in permitting the old leaf, its photograph and the transcribed record to be introduced in evidence. *Chauvin v. Wagner*, 18 Mo. 531; *Tome v. Parkersburg Ry.*, 39 Md. 36. (2) The court erred in admitting in evidence the transcribed record of the deed from Wamsley to Bennett. A deed defectively acknowledged cannot be read in evidence until there is some proof that a deed once existed. R. S., sec. 679; *Harden v. Lee*, 51 Mo. 241; *Atwell v. Lynch*, 39 Mo. 519; *Hamshire v. Floyd*, 39 Tex. 103. (3) The court should have excluded the depositions of Mrs. Owens, of Parks, Boone and Brummett. These depositions attempted to show that the administrator of Wamsley did not have the deed in his possession without evidence first tending to show that a deed ever existed. (4) The court should not have left to the jury the legal effect of the deeds. *Hunt v. Railroad*, 75 Mo. 252; *Bailey v. Ormsby*, 3 Mo. 580; *Hickey v. Ryan*, 15 Mo. 63; *Cape Girardeau v. Harbinson*, 53 Mo. 90; *Wiser v. Chesley*, 53 Mo. 547.

Buler & Timmonds for respondents.

(1) The only real question in this case was, "did the defendant, Pinson, in 1859, execute a deed conveying the land in controversy to Alexis Wamsley?" The depositions of Florence K. and William Addis are sufficient to authorize the introduction of a record of such

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deed. 1 R. S., 1879, sec. 697; *Barton v. Murian*, 27 Mo. 235; *Boyce's Trustees v. Mooney*, 40 Mo. 104. (2) The old leaf, of which a photograph is attached to the transcript, is shown by the testimony of the recorder of deeds to be part of the original record book B, he being the legal custodian of the record and as such it was properly admissible in evidence. R. S., sec. 697, *supra*; *Odiorne v. Bacon*, 6 Cush. 185; *Miller v. Hale*, 26 Pa. St. 432; *Gray v. Davis*, 27 Conn. 447. (3) The fact that it has been injured and defaced by decay or other causes for which plaintiffs are not responsible, does not invalidate it as evidence so far as it can be deciphered. 1 Greenleaf's Evidence (Redf. Ed.) sec. 565; *Woods v. Hildebrand*, 46 Mo. 284; *Donaldson v. Williamson*, 50 Mo. 407. (4) The book identified by the testimony of the recorder of deeds as book B of transcribed records, is made by the special act of the legislature *prima facie* evidence of what the original deed record B contained. Act 1883, 130. That act is a constitutional and proper exercise of legislative authority. Cooley's Const. Lim. (4 Ed.) marginal pages 457 to 460; *Hope Mut. Ins. Co. v. Flynn*, 38 Mo. 483. (5) The record having been properly admitted to show that Pinson did convey a lot of land in Barton county to Wamsley, and appearing on its face to be so defaced and decayed that a part of the description of the land therein conveyed had become illegible the question as to whether the identical land in controversy was included in the description of the land conveyed, was one to be determined from other evidence, and all the facts and circumstances in the case, and was properly left to the jury. *Hunt v. Mo. Pacific Ry.*, 75 Mo. 252; *Slayback v. Gerkhart*, 1 Mo. App. 333.

BLACK, J.—This action of ejectment was commenced in 1882. In 1857, Pinson entered some four sections of land in Barton county and received patents therefor. The eighty acre tract in question is a part

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thereof. Plaintiffs claim title by virtue of a deed from Pinson and wife to Wamsley made on first of February, 1859, conveying these Barton county lands, and a deed from Wamsley to Brummett dated November 2, 1860; they also claim through six or seven other deeds about which no question is made here. Mr. Burkhart testified that he had been in the recorder's office of that county since 1868; that the deeds filed in 1859 and 1860 were recorded in books B and C; that those books were mutilated and to a great extent destroyed during the late war; that such portions as were legible had been transcribed; and that the original books were in a better condition when copied than at the time of trial, in 1883. Plaintiff then read in evidence from a mutilated leaf such portions of a deed as could be deciphered. This showed a deed from A. L. Pinson and wife to Alexis Wamsley to lands in Barton county, formal in all respects, to and including the description of several parcels of land, but not the one in question, then only a few words here and there could be made out, showing, however, further words of description. The transcribed record was also read, which is substantially the same, save that a few more words are made to appear. The transcribed record of the deed from Wamsley to Brummett was also read, which is full and formal in all respects save that hereafter noticed, and included the property in question. Numerous objections were made and exceptions saved to the evidence received by the court.

1. The act of March 30, 1883 (Laws 1883, p. 130), provides that these transcribed records "shall be entitled to the same faith and credit that the original records * * * were entitled to" and "shall be received in all courts of this state as *prima facie* evidence of the contents of the original deed records." We do not understand it to be insisted here that this law is unconstitutional, as it was below. Let it be conceded that these transcribed records stand upon the same footing as the original

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books of record and that they are evidence only of what appears upon their face.

2. These records do not show in either case the seal of the officer taking the acknowledgment; nor is there any note of the place where the seal was placed. The recorder is not required to copy the seal of the officer who took the acknowledgment. It is sufficient if the officer states in the body of the acknowledgment that he affixed the seal of his office. This authorizes the presumption that the seal was affixed. *Geary v. City of Kansas*, 61 Mo. 379; *Norfleet v. Russell*, 64 Mo. 177. This statement is clearly made in the body of the acknowledgment in the one case and we think it sufficiently appears in the other.

3. It is further contended that these acknowledgments were insufficient to entitle the deeds to be recorded at all, and hence the records should have been excluded. The acknowledgment to the deed to Wamsley, as shown by the transcribed record, purports to have been taken before the clerk of the county court of Henry county, in which Pinson, the grantor, resided at the time. It is a formal acknowledgment to and including the statement that the wife relinquished her dower when it proceeds: "freely, voluntarily *and without compulsion or undue influence* of her husband. *In witness whereof I have herunto set my hand and affixed the seal of said court this the* ——— *day of February, 1859.* L. H. Tott, clerk." The italicised words do not appear, but blank spaces for them or words of similar import do appear. The omitted words, as to the wife's acknowledgment, are wholly immaterial here, for the question of dower is not involved. The acknowledgment of the deed made by Wamsley was taken before the clerk of the circuit court of the same county and is full and formal save it is signed, "Richard — clerk." Now as these acknowledgments are formal in all other respects, were taken before recognized officers, and in view of the

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condition of the old records and the inability of the parties to produce the original deeds, we may presume they were formally filled out and signed, even if anything more should be required than now appears. Presumptions are constantly made in favor of the regularity of the acts of public officers. In Stephen's Digest of Law of Evidence, article 101, the rule is thus stated: "When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with." This or any other statement of the rule, in the nature of things, must be more or less vague. The rule can only be understood by an examination of decided cases. Best's Prin. of Evid., sec. 355. A statement on a composition deed that the deed had been duly registered pursuant to the bankrupt act, was held to be *prima facie* evidence that an affidavit required by the act was in pursuance thereof delivered to the registrar with the deed. *Id.* sec. 359. We have just had an instance of the application of the rule where the seal of the officer is not shown by the record, but is presumed to have been affixed to the deed. See, also, *Long v. The Jop. M. & S. Co.*, 68 Mo. 422. The presumptions made in the case at bar are in harmony with all the probabilities and not opposed by a single circumstance in evidence.

4. The plaintiffs did not have these deeds in their possession. It was also shown that Wamsley's papers had been destroyed at the time these records were defaced. His administrator and the administrator of Brummett, show that diligent search had been made and the deeds could not be found. This was sufficient to entitle the plaintiff to resort to secondary evidence. 1 Greenl. Evid., sec. 558, and note *c* to sec. 84 (4 Ed.) Where a record is partly destroyed or lost the remaining portion should be introduced. *Nims v. Johnson*, 7 Cal. 110. The real question, therefore, was whether the lands in question were included in the Pinson deed.

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This it was competent to show by parol evidence, both as to the deed and record. Whart. L. Evid., secs. 129 and 135; Greenl. Evid., secs. 84 and 509. The declarations of Pinson made in 1859 that he had sold his Barton county lands to Wamsley and his declarations made to young Brummett just before this suit was commenced, tending to the same result, were competent as against him. The objection that this and the other evidence allowed plaintiff to make title by parol evidence is not tenable. The whole purpose of the evidence was to show the existence, loss and the contents of the deed and record. If the deed was executed, acknowledged and recorded, the loss of the deed and the destruction of the record could not affect the grantee. As to him and his grantee it was still a properly recorded deed.

For a period of twenty years, Pinson paid no attention to the land; he was present at the trial and on the witness stand, and did not pretend to say that he had not sold this land. The judgment is right and it is affirmed. All concur.

STURGEON *et al.*, Appellants, v. HAMPTON.

1. **Swamp Lands : POWER OF COUNTIES OVER : STATUTE.** The amendatory act of the general assembly of 1875 (Laws, p. 32), providing that all lands in this state selected under the act of congress donating swamp lands to the state "be and the same are hereby declared to vest in full title and belong to the counties in which they may lie," did not enlarge the powers of the county courts over the swamp lands. Notwithstanding said act, the counties still held them for the uses and with the power of disposition under the then existing laws.
2. ———. The swamp lands are not the general property of the counties.

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3. **Swamp Lands, Sales of: PATENT.** Under the laws (R. S. 1855, p. 1006, secs. 3-4) providing for the sale of swamp lands by sheriffs, under orders of the county courts, patents therefor were to be made by the governor, but not until full payment of the consideration therefor.
4. — : — : **COMMISSIONER.** The county court did not have the power to appoint a commissioner to convey swamp lands, nor could it release a purchaser from the payment of the consideration.
5. — : —. The swamp land laws provide when and how title thereto is to be made. These statutes are exclusive, and the method thus prescribed must be pursued.
6. **County Courts, Powers of.** The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law, and when they exceed their statutory authority their acts are void.
7. — : **NOTICE.** Persons dealing with such agents are bound to take notice of their powers and authority.
8. — : **ESTOPPEL.** Counties are not estopped by the illegal and void acts of their limited statutory agents.
9. **Swamp Lands: ACT OF MARCH 26, 1868.** The act of the legislature approved March 26, 1868 (Laws, p. 67) entitled "An act to perfect the title to lands known as swamp lands," was not intended to make valid a void sale or a deed when the purchaser was not entitled to one.

Appeal from Chariton Circuit Court.—HON. G. D. BURGESS, Judge.

AFFIRMED.

Wm. W. Rucker, Andrew Mackay, Jr., G. R. Lockwood and Noble & Orrick for appellants.

(1) The act of congress of September 28, 1850, conveyed to the state of Missouri a fee-simple title to swamp and overflowed lands within its borders, subject to the conditions contained in said act, and for a breach of these conditions congress alone can annul the conveyance, or the United States enter. Act of Congress, Sept. 28, 1850; U. S. Stat., vol. 9, p. 519; *Dunklin County v. Dunklin County Court*, 23 Mo. 456; *Campbell v. Wort-*

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man et al., 58 Mo. 258; *Adams Co. v. Am. Emigrant Co.*, 100 U. S. 61. And under this act no patent was necessary to convey the legal title to the state of Missouri. Washburn's Real Property (4 Ed.) vol. 3, secs. 29-32, pp. 230, 231; *Grignon v. Astor*, 2 How. 319; *Chouteau v. Eckhart*, 2 How. 344. And a grant by the government, state or federal, cannot be impeached collaterally in an ejectment suit. Washburn's Real Property (4 Ed.) vol. 3, sec. 35, p. 193. (2) The state of Missouri could and did, prior to 1860, convey to Chariton county the fee-simple title to swamp and overflowed lands within the borders of said county, and Chariton county had the right to convey said lands to the C. & R. R. Co., the N. Mo. R. R. Co., and the plaintiffs herein (appellants) in manner and form and for the consideration for which they were conveyed. *Adams Co. v. Am. Emigrant Co.*, 100 U. S. 61; Sess. Acts 1861, p. 394; Sess. Acts 1850-1, p. 238; Sess. Acts 1854-5, p. 160; Sess. Acts 1854-5, p. 349; Sess. Acts 1857, p. 32; Sess. Acts 1857, p. 275; R. S. Mo. 1855, sec. 2, p. 502; R. S. Mo. 1855, sec. 17, p. 535; *Hannibal & St. Jo. Ry. v. Marion Co.*, 36 Mo. 275; *Reardon v. St. Louis Co.*, 36 Mo. 555; *In re Saline Co.*, 45 Mo. 52; *Page Co. v. Am. Emigrant Co.*, 41 Iowa, 115; *Audubon Co. v. Am. Emigrant Co.*, 40 Iowa, 460; *Allen v. Cerro Gordo Co.*, 34 Iowa, 54; *Emigrant Co. v. Wright Co.*, 97 U. S. 339; Cooley on Const. Limit. 240; *Linville v. Bohanan*, 60 Mo. 554; *Mitchell v. Nodaway Co.*, 80 Mo. 257. And the C. & R. Railroad Company had authority to convey the land in question to the North Missouri Railroad Company and receive subscriptions payable in land from the county; and the North Missouri Railroad Company was authorized to receive and convey said lands to Ann C. Sturgeon. Sess. Acts 1851, 483; Sess. Acts 1859-60, 208. (3) Until the act of 1863, sec. 7, p. 31, the county court of Chariton county was not forbidden to sell swamp lands for less than \$1.25 per acre. R.

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S. Mo. 1865, 281; Sess. Acts 1863, sec. 7, p. 31; R. S. Mo. 1855, 502; acts cited under point two. (4) The fee-simple to the lands in controversy having been granted to Chariton county, it was not competent for the state by subsequent legislation to fix a minimum price at which the county could sell. 3 Washburn's Real Property, (4 Ed.) sec. 29, p. 191. (5) That the sheriff of Chariton county made the sale of the land in controversy on the tenth of May, 1860, is shown by a preponderance of evidence, to-wit: The numerous orders of the county court, setting forth such sale, and the deeds executed by its agents wherein such sale is declared to have been made. (6) But at this time (1860) a sale by the sheriff was not required. Acts above cited; R. S. Mo. 1855, 502. (7) And even if such sale were necessary, the county of Chariton, and this defendant, who must be held to have notice of the fact that such sale was declared by the county court, as above stated, to have been made, are estopped from denying that such sale was made, the plaintiffs having relied upon these orders and deeds. *Phelps v. Kellogg*, 15 Ill. 131; *Audubon Co. v. Am. Emigrant Co.*, 40 Iowa, 460; *Durette v. Briggs*, 47 Mo. 356. (8) The act of March 26, 1868, cured any irregularities in the sale of the land in 1860, 1865 and 1866. *Barton Co. v. Walser*, 47 Mo. 189; Sess. Acts 1868, 67; *Dillon on Corporations*, vol 1, (3 Ed.) 96, 104; *Bridgeport v. Ry. Co.*, 15 Conn. 475; *Wilcoxon v. Osborne*, 77 Mo. 621. (9) The plaintiffs' title to the swamp lands was not affected by the application of the proceeds of sale by the county court. *Dunklin Co. v. Dunklin County Court*, 23 Mo. 455; *Emigration Co. v. Wright Co.*, 97 U. S. 337; *Adams Co. v. Emigration Co.*, 100 U. S. 61; *Mills Co. v. Railroad Co.*, 107 U. S. 557, 566; *Hager v. Reclamation Dist. No. 108*, 111 U. S. 712.

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H. Lander and F. O. Smith for respondent.

(1) The county could not subscribe to the stock of a railroad without a vote of the taxpayers thereon. 1 R. S. 1855, 427, 429; Acts 1859, p. 320; *Leavenworth v. Platte Co.*, 42 Mo. 171; *Stevens v. Franklin Co.*, 48 Mo. 167. (2) The grant of the swamp lands to the county placed the legal title in it in trust for school purposes. *State ex rel. v. New Madrid Co.*, 51 Mo. 85; *Veal v. Chariton Co.*, 15 Mo. 412; *Butler v. Chariton Co.*, 13 Mo. 112. And the trust could not be diverted by the trustee. Perry on Trusts, secs. 700, 733, 734; *Mudfield v. Morris*, 11 Kan. 151. (3) The trust being created by public acts, all persons are bound by it, even a purchaser for value. Hill on Trustees top p. 764; *Andrew Co. v. Craig*, 32 Mo. 531; 2 Sudg. on Vendors, 533. (4) In ordering the sale of swamp lands, the county courts do not act judicially, but ministerially, as agents of the county under the law. *In re Saline County Subscription*, 45 Mo. 51. County courts are not general agents of the county to do any and all things. They only have such powers as are granted, defined and limited by law, and like all other agents, they must pursue their authority and act within the scope of their powers. *St. Louis v. Alexander*, 23 Mo. 483; *Wolcott v. Lawrence Co.*, 26 Mo. 272; *Steines v. Franklin Co.*, 48 Mo. 167; *Valle v. Fleming*, 19 Mo. 454; *Reardon v. St. Louis Co.*, 36 Mo. 555; *State v. Shortridge*, 56 Mo. 126; *Bauer v. Franklin Co.*, 51 Mo. 205; *Saline Co. v. Wilson*, 61 Mo. 237. (5) And the county is only bound when its officers and agents act within the granted powers. *State v. Clark*, 41 Mo. 44; *Sheely v. Wiggs*, 32 Mo. 398; *Steines v. Franklin Co.*, 48 Mo. 167; *Wolcott v. Lawrence Co.*, 26 Mo. 272. All persons dealing with counties are bound to know that its officers act within their authority. *State v. State Bank*, 45 Mo. 529,

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538; *State v. Clark*, 41 Mo. 44. A purchaser of swamp land is presumed to know, as a matter of public record, the agent's authority. *Dart v. Hercules*, 57 Ill. 446. Even a patent granted by the governor for swamp lands is worthless unless it be given pursuant to law. *Rember v. Wills*, 24 Mich. 15. (6) The county court had no power to appoint Hammond commissioner to make deed; the governor alone could convey under the law, and no deed could be made until full payment of the purchase money. 2 R. S. 1855, p. 1006, sec. 4; *Andrew Co. v. Craig*, 32 Mo. 528, 531. (7) The order of the county court of May 10, 1860, directing the sheriff to sell on that day, to the Chariton & Randolph Railroad, twenty-two thousand and four hundred acres of swamp lands in a lump, in consideration that the company would "assume to pay by written obligation to said county" for the use of the school funds, three thousand dollars "annually forever," was without any authority of law and void. (8) The Cunningham deed and the one by Holcombe as commissioner were also void. An agent cannot ratify his own void acts. *State v. Bank*, 45 Mo. 542; *Commissioners, etc., v. Carler*, 2 Kan. 115. (9) The act of 1868 (Laws p. 37) was intended to cure defectively executed deeds and not irregular or void sales of swamp lands. *Barton Co. v. Walser*, 47 Mo. 189. (10) The county is not estopped by the unauthorized acts of its agents in the collection of taxes on the lands which were not taxable, and by the making and approval of illegal orders and deeds. These acts were all *ultra vires*. *St. Louis v. Gorman*, 29 Mo. 593; *Rossire v. Boston*, 4 Allen (Mass.) 57; *McFarland v. Kerr*, 10 Bosw. (N. Y.) 249; *Hutchinson v. Cassidy*, 46 Mo. 431, 434; *State v. State Bank*, 45 Mo. 528; *Walcott v. Lawrence Co.*, 26 Mo. 372. (11) There was no error in allowing the parol evidence of ex-sheriff Crawley and his brother, stating that no sale or report of sale was ever made by the sheriff or any one authorized by him

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under the order of the tenth of May, 1860. *Hutchinson v. Cassidy*, 46 Mo. 431, 433-4.

BLACK, J.—This is an action of ejectment. Both parties claim title from Chariton county. The section of land in dispute is a part of the swamp lands of that county. The plaintiff's title is as follows:

1. On tenth May, 1860, the county court of that county made an order directing the sheriff to sell on the same day twenty-two thousand and four hundred acres of swamp land to the Chariton & Randolph Railroad Company, in consideration that the company assumed to pay to the county for the school fund three thousand dollars annually forever. On the same day the court made another order, reciting a sale made by the sheriff and report thereof, all of which was approved. The clerk was directed to certify to the governor that the consideration had been discharged and that he issue patents to the company. The governor declined to issue any patents. On July 2, 1860, the court appointed Hammond a commissioner to make a deed to the company, which he did, including therein the land in question. This deed recited a consideration of three thousand dollars, payable annually forever, to the school fund.

2. On November 6, 1862, the court made an order discharging the company from the payment of the three thousand dollars annually, provided it would construct its road within one-half mile of Keytesville, and locate a depot at that place; and on April 5, 1865, the court directed Cunningham, the presiding justice, to make a quit claim deed to the North Missouri Railroad Company for some thirteen thousand acres, that company having acquired a conveyance thereto from the Chariton & Randolph Railroad Company, which deed he made on the same day, reciting a consideration of one hundred dollars. This deed also includes the land in question.

3. On eighth of February, 1866, the court made an

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order setting aside the order of sixth of November, 1862, as to the location of the road and depot, and fixed upon another location near Keytesville. This order then recites the Hammond deed, an agreement of the Chariton & Randolph Railroad Company to sell the land to the North Missouri Railroad Company, and in order to secure the same to that company and for the consideration of one thousand dollars of paid up stock in the west branch of the North Missouri Railroad Company, and upon the condition that the branch road should be built and a depot located at the place last designated, Holcombe is appointed a commissioner to convey the land by quit claim deed to the North Missouri Railroad Company, which deed he made.

4. On eleventh of May, 1866, the court made another order accepting the one thousand dollars of paid up stock in the branch road as a full consideration to be paid by the North Missouri Railroad Company for these swamp lands, and discharged that company from the payment of any other or further sum, and directed its clerk to join with the company in the execution of deeds to purchasers; and on December 9, 1867, the clerk and the company executed a deed to the land in question to plaintiff.

The branch road and depot were built at the designated place. Defendant purchased and paid for the land in question under the provisions of law relating to sale of swamp land in 1880 and took possession thereunder. The act of congress of September 28, 1850, vested the title to the swamp lands thereafter to be selected in the state, primarily for the purpose of reclaiming them. The trust, it is held, is a personal trust reposed in the state, and does not follow the land. 23 Mo. 456; 100 U. S. 61. So that we are here only concerned with the state statutes.

By the first section of the act of 1851, as amended and contained in Revised Statutes of 1855, the state donated

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these lands to the counties in which they were situate, "for the purpose hereinafter designated." By subsequent sections the county courts are authorized to have them drained and reclaimed. An actual settler is given the right to pre-empt eighty acres and to pay for the same in two installments. The net proceeds of all the sales, after defraying the expenses of drainage, etc., are required to be paid into the county treasury and become a part of the school fund of the county. The amendatory act of 1857 (Acts 1857, p. 32) provides "that all lands in this state selected" under the act of congress, "be and the same are hereby declared to vest in full title and belong to the counties in which they may lie." This act was probably passed because of the fact that the lands were not selected and designated until long after the passage of the act of 1851. However that may be, there is nothing in the act which enlarges the powers of the county courts over them. The counties still held them for the uses and with power of disposition under the then existing laws. The lands are not the general property of the counties. It was so held in *State ex rel. Robbins v. New Madrid County Court*, 51 Mo. 84. Other sections of the swamp land law (R. S. 1855, 1006) having a more direct bearing upon the questions involved in this case are as follows:

"Section 3. Whenever in the judgment of said county courts it shall be to the interest of said counties so to do, they shall order the sheriff to sell the same, in such quantities at such times, and places, and on such terms as they may think proper, with or without draining and reclaiming the same, as in their discretion they may think most conducive to the interests of their respective counties.

"Section 4. Whenever full payment shall be made for any of said lands by the purchasers thereof, the county courts shall cause the same to be certified to the

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governor, who shall thereupon grant to the purchaser, his heirs and assigns, a patent for the same," etc.

From these provisions of the law it is clear no deed or patent could be made until full payment of the consideration. The counties by force of these provisions held the title as a security for the payment of the purchase money. The patents were to be issued by the governor. The Hammond deed, made in 1860 was, therefore, made in plain violation of the law, for the consideration had not only not been paid, but no part of it was yet due. Besides this, the court had no power to appoint Hammond a commissioner, and when appointed he had no authority to make the deed. Reliance for authority so to do is placed upon section 2, page 502, Revised Statutes, 1855. That section does give to the county courts authority to appoint a commissioner to sell real estate belonging to the counties, and to execute deeds, but it has no application to the sale of these swamp lands. It relates to the general property of the counties. The swamp land laws provide when and how title thereto is to be made, and those statutes are exclusive, and the method there pointed out must be pursued. The special act of March 15, 1861, (Acts 1860-1, 394) gave to the county clerk of Chariton county power to make deeds to purchasers of the swamp lands, but that act, like the general law, gave him such power only "when the purchase money shall be fully paid off and satisfied, or the terms of the contract complied with." The terms of the sale, that is, three thousand dollars, payable annually forever, are certainly unusual, in view of the fact that no legal title could be made until full payment of the purchase price; still treating the terms of the sale as coming within the law, we do not see by what authority the county courts could release the railroad company from the payment of the consideration. The act of February 8, 1861 (Acts of 1860-1, 40) gave the county courts authority to cancel

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contracts with persons for the purchase of these lands when such persons had become unable to pay the purchase price, but in such cases the land was to be re-sold under the provisions of the swamp land laws. That the county court had no power to trade the obligation of the company to pay three thousand dollars annually to the school fund, for the agreement of the company to build its road and locate a depot near Keytesville, is too clear to call for argument. The Cunningham deed, as an independent transaction, had no sheriff's sale to support it, and so far as the orders of the county courts go, there was no consideration whatever paid for the thirteen thousand acres. As a deed, to confirm the Hammond deed, it was subject to the same infirmities. The Holcombe deed and the deed of the county clerk were designed to ratify the prior transaction by putting in a consideration of one thousand dollars paid up stock in the branch road. While authority was given by section thirty-three, page 429, Revised Statutes, 1855, to counties to sell their swamp lands to pay subscriptions for stock in railroad companies, and the Chariton & Randolph Railroad Company had authority to receive land at an agreed valuation, in payment for its capital stock (Acts 1859-60, 208), still it is agreed by this record that the county never subscribed for stock in either of these companies. By a special act (Acts of 1858-9, 320) Chariton county could not make such a subscription without a majority vote of the taxpayers. No such vote was taken under that act or the general law.

1. The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void. *Saline County v. Wilson*, 61 Mo. 237; *Wolcott v. Lawrence County*, 26 Mo. 275; *Seines v. Franklin County*, 48 Mo. 167. Persons dealing with such agents are bound to

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take notice of their powers and authority. *State v. Bank*, 45 Mo. 538; *Andrew County v. Craig*, 32 Mo. 531. We should go far to uphold their acts when merely irregular, but in this case the right to a deed for these lands must stand upon the order of the county court discharging the company from the payment of the agreed compensation to the school fund, and the consideration of one thousand dollars paid up stock. Both these acts were not simply irregularities, but they were without any warrant or authority in law and are void. These infirmities appear upon the face of the deeds and orders to which they make reference, and the purchaser from the company took with full notice.

2. Nor is the county estopped from disputing the validity of these deeds. These quasi public corporations are not estopped by the illegal and void acts of their limited statutory agents. The record shows that the land in question was assessed for taxes for the years 1870 to 1879, both inclusive. The taxes for 1870 were paid by plaintiffs, for the other years the taxes have not been paid. These facts do not constitute an estoppel. *City of St. Louis v. Gorman*, 29 Mo. 593.

3. These deeds must stand or fall upon the act of the legislature, approved March 26, 1868 (Laws, 67) entitled "An act to perfect the titles to lands known as swamp lands," which is as follows: "That all deeds or patents granted or made by the county courts of the state in which any of the lands known as swamp or overflowed lands may lie, shall be deemed and held to be valid and legal, whether issued by the county court or a commissioner appointed by said court for the purpose; and such deed or patent shall vest in the purchaser of any such lands, all right, title or interest of said counties in said lands as fully as if said patents or deeds had been granted by the governor of the state, and countersigned by the secretary of state, as is now provided by general statutes; and the funds arising from such sale shall con-

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stitute a part of the school fund of the respective counties, as is now provided by law."

This act was before the court for consideration in *Barton County v. Walser*, 37 Mo. 189. Then there were irregularities in the sales, and the deeds, certainly some of them were not executed by the proper officers. That the lands had been sold for fair prices, the terms of the sales complied with, and the purchase money paid into the county treasury, were uncontroverted facts. It was then held that the state had not divested itself of all control over the swamp lands; that the counties did not stand in the attitude of individuals, and that these lands were held by them in subordination to the legislative will, and that the act was not within the constitutional prohibition against retrospective legislation. As to the act it is also said: "It takes no property from the county, but says that the title to the land, which was sold and paid for under previous laws, shall vest in the purchasers. If there was any fraud or other infirmity attending the sale which would render it void, those questions are still open and not touched by this decision." We adhere to what is there decided. It was the purpose of this curative act to make valid those deeds executed by officers having no authority so to do, and to give them the force and effect of patents regularly issued by the governor. It was not the purpose of the act to make valid those sales made in violation of law and for purposes not contemplated by any statute. It contemplates sales from which funds may arise, for they are to constitute a part of the school fund. In short, it does not make valid a void sale, or make valid a deed when the purchaser is not entitled to one.

There never was a time in the history of these transactions when a deed could have been made to the railroad companies, or either of them, under any existing law. It follows from what has been said that the judg-

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ment should be affirmed. It is so ordered. Sherwood, J., and Henry, C. J., dissent. The other judges concur.

HENRY, C. J., DISSENTING.—The act of congress of 1850 was a grant of the title of the swamp lands to the state, "subject to identification of the specific parcels coming within the description." *Martin v. Marks*, 97 U. S. 347; *Stephenson v. Stephenson*, 71 Mo. 127. While the grant was made to the state, with a view to the drainage and reclamation of the swamp lands, no trust was "fastened upon the lands, but a personal trust in the public faith of the state" was reposed. *Dunklin County v. Dunklin County Court*, 23 Mo. 456; *Emigrant Co. v. Adams County*, 100 U. S. 61. By the act of February 3, 1851, the state granted these lands to the several counties in which they were situate. That act was an honest attempt on the part of the general assembly to effectuate the purpose for which the lands were donated to the state. Throughout its provisions the main purpose of reclamation and draining of the lands is prominent. By the act of 1855, however, the several county courts were authorized "to sell and dispose of swamp and overflowed lands within their respective counties, whether with or without draining, or reclaiming the same, *as in their discretion they may think most conducive to the interests of said county.*" This enlarged the power of the county courts over the swamp lands.

It might still have been contended, however, that, even under that act, the county court could sell them only for the purpose, and on the terms mentioned in the previous swamp land acts; but in 1857 the legislature passed an act, declaring, "That all lands in the state, selected under and by virtue of the act of congress of September 28, 1850, entitled, etc., be and the same are hereby declared to vest *in full title, and to belong to the counties in which they lie*"; and by the gen-

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eral law then in force (sec. 2, p. 502 R. S. 1855), the county court was authorized to appoint a commissioner to sell and dispose of any real estate belonging to the county, and execute a deed, etc. This act was still in force when the Hammond and Holcombe deeds were executed. That it was within the power of the legislature to grant these lands to the county in fee-simple, stripped of all trusts, has been expressly held by the Supreme Court of the United States, in *Mills Co. v. Railroad Companies*, 107 U. S. 565, and, if the act of 1857 did not vest the title of these lands in the county of Chariton, it would be difficult to find language that would accomplish that object. If the act had that effect, it ends this controversy, for the county could sell the lands by a commissioner, under the general law. Sec. 2, p. 502, R. S. 1855. That the county court had no authority to release the railroad company from the consideration it agreed to pay for the lands, three thousand dollars annually forever, does not affect the question of title. The title passed by the commissioner's deed, and, if the county court had no authority to release the railroad company from its obligation, that obligation rests upon the company still. Nor does it matter that the contract between the county court and the railroad companies was fraudulent and corrupt. That cannot affect the title of an innocent purchaser, and no fraud is alleged in defendant's answer.

The following propositions are conceded: First, the act of congress of 1850 operated as a grant of the lands to the state, upon their selection, and did not impose a trust upon the land. Second, the state could, if it saw proper, grant the lands to the counties in which they lie, or to an individual, divested of all trusts; and the only question remaining, about which there is, or can be any controversy, is, did the act of 1857 so grant the lands to the counties in which they were situate? Satisfied that the answer to the last question must be af-

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firmative, that the language of the act of 1857 is emphatic, unambiguous, and clearly passed the title to the land in controversy to Chariton county, to be held in fee-simple absolute, the same as if an individual instead of the county had been named therein as grantee, I cannot concur in the foregoing opinion. Judge Sherwood concurs with me.

ZIMMERMAN, *Appellant*, v. SNOWDEN *et al.*

1. **Proceeding to Establish Public Road:** ACT OF 1868: JURISDICTIONAL FACTS. Proceedings to establish a public road under the road law of 1868 (Laws, 1868, p. 157) must show that the petition was signed by "twelve householders of the township or townships in which the road is desired, three of whom shall be of the immediate neighborhood," and that the notices of the intended application for the road had been posted for "twenty days prior thereto." These are jurisdictional facts and must appear on the record of the proceeding, otherwise the latter is void; certainly so as against land owners who did not relinquish their rights of way.
2. **Public Road, Acquisition of by Use.** The public may acquire the right to the use of a road on the land of another from its use and adverse occupancy, acquiesced in by the land owner for a period of ten years.
3. ———: ———. In determining what is a sufficient use by the public of the road regard must be had to the condition of the surrounding lands and their state of improvement. The circumstance that travel for the most part departed from the line of the real location of the road to avoid a hill is not a controlling one to defeat the claim of the public.

Appeal from Andrew Circuit Court.—HON. H. S. KELLEY, Judge.

AFFIRMED.

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Samuel Ensworth for appellant.

(1) County courts in establishing roads, changing roads, or in making orders to open roads must confine themselves to the statute, otherwise their proceedings are nullities, and a person may resort to a petition in equity and injunction for relief against the acts of the county court and overseers. *Carpenter v. Gresham*, 59 Mo. 247; *County of Cooper v. Geyer*, 19 Mo. 260, 261; *Jefferson County v. Cowen*, 54 Mo. 234; High on Injunctions, secs. 124, 125, 126, 127 and 128, pp. 78, 79 and 80.

(2) In summary proceedings, where the rights of third parties are involved, the law always implies that they shall have reasonable notice to prepare for the protection of their rights. *Patton v. Wrightman*, 31 Mo. 432.

There is no dedication in this case, as the owners never consented to the road, which is necessary to a dedication. *Becker v. City of St. Charles*, 37 Mo. 13.

(3) Courts of limited or special jurisdiction should show affirmatively by their proceedings of record facts which give the court jurisdiction of the matter acted upon. *McCloon v. Beatie*, 46 Mo. 39, and citations, and also *Edwardson v. Kite*, 43 Mo. 179.

C. F. Booher for respondent.

BLACK, J.—The plaintiff became the owner of the southwest quarter of section 10, township 59, range 34, in Andrew county, in 1879, and then enclosed the same with a fence. The defendants, the road overseer and county court, made claim for an established public road over the west line of the land, and were about to remove the obstruction when plaintiff procured a temporary injunction restraining them from so doing, which was dissolved on final hearing and from that judgment he took this appeal.

1. Proceedings were had in the county court in

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1871, resulting in an order establishing a road north and south between sections 9 and 10, and to the north and south of those sections. Many owners of property relinquished their claims for damages and conveyed a right of way to the county. Those proceedings fail to show that the petition was signed by "twelve householders of the township or townships in which the road is desired, three of whom shall be of the immediate neighborhood," or that the notices of the intended application had been put up for "twenty days prior thereto," as required by the road law (Acts of 1868, p. 157). These are jurisdictional facts necessary to be made to appear upon the record somewhere, otherwise, under the former rulings of this court, the proceedings are void. Certainly so as to those owners who did not relinquish the right of way. *Jefferson Co. v. Cowan et al.*, 54 Mo. 234; *Whiteley v. Platte County*, 73 Mo. 30. No claim is made that those persons through whom the plaintiff claims title ever made such relinquishment.

2. The evidence shows there was a public road running north and south over the east half of section 9 in 1845. In 1856, at the request of Bowman, the owner of that tract, the county court made an order changing the location of the road, east to the line of the two sections. This was done without the consent of the owners of section 10, and the order was not binding upon them. Bowman, then, in 1856, enclosed his land placing the fence in twenty feet in order to accommodate the road. The road as thus located was then cleared out, a bridge built across a creek, and the road was kept in repair and used by the public. During and since the late war the repairs have been neglected, though the road at its north and south ends on plaintiff's land has at all times been used as a public highway. Because of a hill or stony point in the road on plaintiff's land the travel has been accustomed to go around over the open prairie, though there has at all times been more or less travel

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over the immediate line of the road as located in 1856. While there was no road established by condemnation binding upon the parties not consenting thereto, and it does not appear that the owner of this land by any positive and unequivocal act dedicated the same to public use for a road, to do which requires no specific length of time, still it is the settled law of this state, that the public may acquire the right to the use of a road on the land of another from use and adverse occupancy, acquiesced in by the owner, for a period of ten years. *State v. Walters*, 69 Mo. 463. Or, as was said in *State v. Wells*, 70 Mo. 637, "so that ten years adverse occupancy and use of a road by the public would be sufficient, if acquiesced in by the owner, to vest in the public an easement in the road and cause it to become a highway."

Here this road has been used, known and recognized as a public highway for a period of over twenty years. We do not regard the circumstance that travel, for the most part, departed from the real location to avoid the hill, as controlling. In determining what will constitute a sufficient use we must keep in view the condition of the surrounding lands and their state of improvement. Besides this, the line of the road was definitely fixed when laid out and cleared off and that entire route has been to a greater or less extent traveled and used ever since, until closed up by the plaintiff. It is true the land was for the greater portion of this time owned by non-residents, but the plaintiff purchased the same from Mr. Caldwell, who was called as a witness and states that he knew there was a road over the west side of this land for he had traveled over it twenty or twenty-five years ago. So far as he is concerned he must be held to something more than a passive acquiescence. Upon the whole we have no doubt but the public have acquired a right to the use of this road as a public highway, irrespective of the orders of the county court. The judgment of the circuit court is, therefore, affirmed. All concur.

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THE STATE *ex rel.* SLIGO IRON STORE COMPANY v. MASON *et al.*, Appellants.

Equity of Redemption : HOMESTEAD IN. A owned as a homestead in the city of St. Louis, property worth \$5,500, on which he had executed a deed of trust to secure a debt for \$3,500. *Held*, he was entitled to a homestead in the equity of redemption. Distinguishing *Casebolt v. Donaldson*, 67 Mo. 308.

Appeal from St. Louis Court of Appeals.

REVERSED.

Krum & Jonas for appellants.

(1) The circuit court and court of appeals erred in holding that the homestead act, upon a fair construction, does not provide for the appointment of appraisers and the setting apart of a homestead by a sheriff, when property on which there is a homestead is levied upon by him under a writ of attachment in his hands. *R. S.*, sec. 2690 *et seq.*; *Vogler v. Montgomery*, 54 Mo. 583; *State, etc., v. Dixeling*, 66 Mo. 379; *Casebolt v. Donaldson*, 67 Mo. 311; *Lamb v. Mason*, 50 Vt. 352; *State, etc., v. Emerson*, 39 Mo. 89. (2) The respondent, if dissatisfied with the action of the sheriff and appraisers, could have proceeded by motion to quash the proceedings. *Creath v. Dale*, 69 Mo. 41; *R. S.*, sec. 2698; *Schaeffer v. Beldsmeier*, 9 Mo. App. 445. (3) In the absence of any action being taken by respondent with reference to the claim of the homesteader, the report of the appraisers was conclusive. *Schaeffer v. Beldsmeier, supra*; *Thompson on Homesteads*, sec. 667. (4) It was error in the courts below to assume that an attaching or judgment creditor seeking to enforce his debt could compel a severance of the mortgage and the property which protected it.

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Taylor & Pollard for respondent.

(1) The sheriff exceeded his authority by setting out and releasing the realty as a homestead to Sheehan, before judgment and levy of execution. R. S., secs. 2690-2. (2) The statute gave the sheriff no authority to appoint appraisers to set out a homestead in the realty, held under the levy of attachment. Such appraisers can only be appointed after judgment and levy of execution. (3) Revised Statutes, section 2689, defines specifically the kind of homestead which shall be exempt to "every housekeeper or head of a family." The limitation as to value is as much a matter of description as the provision relating to quantity, occupation, or ownership. *Beccher v. Balsly*, 7 Mich. 499; *Helpenstein v. Case*, 3 Ia. 287. Thompson on Homestead, 112-114. (4) Even if it be held that the sheriff has the right, when an attachment is levied, to release the homestead before judgment and execution, still, in doing this he acts at his peril, and if he makes a mistake as to the law, his good intention will not relieve him from damages to the injured party. *State ex rel. v. Mason*, 15 Mo. App. 141. (5) Sheehan having incumbered all the realty in question, for \$3,500, it not being susceptible of division, and worth \$7,500, could not prevent the incumbrance from being chargeable against his homestead interest, in part, as well as against the excess of value over said homestead; The true rule, in such case, is to charge the incumbrance *pro rata* against both the homestead value, and the excess over the homestead value. This is the rule followed in Vermont, from whence our homestead law was borrowed. *Skouten v. Woods*, 57 Mo. 380; *Lamb v. Mason*, 50 Vt. 345; *Devereaux v. Fairbanks*, 50 Vt. 760; *Gregg v. Bostwick*, 33 Cal. 225; *Searle v. Chapman*, 121 Mass. 19. (6) The usee was damaged by the act of the sheriff, in releasing the realty without authority of law. This

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entitles it to recover damages on the sheriff's bond. Binsmore on Sheriffs, 98; *Cogswell v. Mason*, 9 N. H. 48; Gwynne on Sheriffs, secs. 569, 572; *Kean v. Newell*, 1 Mo. 418; *Berry v. Shackell*, 37 Mo. 284.

HENRY, C. J.—The plaintiff sued Mason and his sureties on his bond as sheriff for an alleged breach of said bond, in releasing from an attachment the property of one Daniel T. Shehan, in the city of St. Louis, which had been levied upon by said sheriff, under an attachment issued in a certain cause in which relator herein was plaintiff, and Shehan was defendant. The property was claimed by Shehan as his homestead, and was of the value of \$5,500, but was encumbered by a deed of trust executed by Shehan and wife to secure a debt of \$3,500. On the claim of homestead made by Shehan the sheriff appointed appraisers, who reported that the property was of the above value and was not susceptible of division. Thereupon the sheriff released the property from the levy, and before final judgment in the cause Shehan sold it to a third person. On the above facts the circuit court found for the respondent and rendered judgment accordingly, which, on appeal to the court of appeals, was affirmed, and the sheriff and his sureties have appealed to this court.

In the view we take of this case it is wholly immaterial whether the sheriff acted prematurely or not, in having the property appraised before final judgment in the attachment cause and execution thereon. If Shehan was entitled to a homestead in the property to the extent of the excess of the value over the mortgage, the sheriff did right to release it from the levy, and would have been in no default if he had made no levy at all. The homestead act secures to every housekeeper or head of a family "a dwelling house and appurtenances and the land used in connection therewith not exceeding the amount and value herein limited, which is, or shall be,

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used by such housekeeper or head of a family as such homestead, together with the rents, issue, and products thereof," exempt from attachment and execution. "In cities having a population of forty thousand or more, such homestead shall not include more than eighteen square rods of ground, or exceed the total value of three thousand dollars." Sections 2690, 2691 and 2698, recognize a homestead right in property which exceeds in value three thousand dollars, but not the quantity, eighteen square rods. Section 2691 provides that, "If at the time of any such levy of execution, the homestead or real estate mentioned in the preceding section shall be encumbered by mortgage, the value and location of such homestead shall be fixed, as provided in said section, and thereupon such levy shall proceed in the same manner as in the case of mortgages existing upon distinct parcels of land." The entire act throughout its provisions manifests a purpose to secure to the head of a family a certain amount of property in extent and value exempt from attachment and execution, so that whatever calamity might befall him in his trade or speculations, his family should have a home. It authorizes him to sell his homestead, and with the proceeds of sale procure another. If it exceeds in value three thousand dollars in a city of forty thousand inhabitants, why may he not sell the excess and retain the balance as a homestead? and if he may sell, why may he not mortgage the excess without forfeiting his homestead claim in the balance?

The cases relied upon by the court of appeals are, *Lamb et al. v. Mason*, 50 Vt. 345, and *Devereaux v. Fairbanks et al.*, *Ib.* 700. In those cases the homesteader had mortgaged his homestead, and judgment creditors paid off the mortgage, and it was held that the homestead should bear its proportion of the mortgage debt. That by thus paying the mortgage they became

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subrogated to the rights of the mortgagee, and could enforce against the homestead the payment of its proportion of the mortgage debt. Ross and Duncan, JJ., dissented, and these opinions appear to be in conflict with *Morgan v. Stearn*, 41 Vt. 398, cited in the dissenting opinion. A case similar, in some respects, to the two reported in 50 Vt. is reported in 79 Mo. page 47, *Hall v. Morgan*. Morgan, the defendant, owned an eighty acre tract, the eastern half of which he mortgaged to a company to secure five hundred dollars, his wife relinquishing her dower. Subsequently he conveyed, by warranty, the eastern forty, so mortgaged, to his son Dick, for the consideration of one thousand dollars. Morgan died, and plaintiff had a demand of four hundred dollars probated against his estate. Dick Morgan, during the pendency of a suit to foreclose the mortgage, sold the east forty to plaintiff for eight hundred dollars, as follows: One hundred and ninety-five dollars in money, and a horse, crediting the probated claim to the amount of two hundred and seventy-five dollars, aggregating four hundred and fifty dollars, leaving a balance of three hundred and fifty dollars. It was agreed between plaintiff and Dick that the east forty was only to bear its just proportion of the mortgage debt, which proportion, it was supposed, would amount to three hundred and fifty dollars, and the deed from Dick to plaintiff contained the words: "subject to the mortgage." After the death of Wesley G. Morgan, the west forty was set off to the widow and minor children as a homestead, and plaintiff's suit was to subject the west forty to the payment of its just proportion of the mortgage debt, and this court held that he was entitled to the judgment he asked. The Vermont cases differ from the case at bar, in that a judgment creditor who has paid off the mortgage is not here seeking to be subrogated to the rights of the mortgagee, and the case of *Hall v. Morgan* differs from this in that there a *bona fide* purchaser of a part of the land mortgaged sought

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to have the other portion of the land charged with its fair proportion of the incumbrance. As to that debt, the homestead exemption was waived and every part and parcel of it was bound for the debt.

Conceding that the son was a *bona fide* purchaser for a full consideration, it would have been inequitable to allow the father to shift the burden of the mortgage debt upon the forty sold to his son, who had a right to have each tract charged with the burden originally imposed upon both by a valid conveyance and his grantee succeeded to all his rights. The case under consideration presents no such equities in favor of the attaching creditors. They have not, as in the Vermont cases, paid the mortgage debt and entitled themselves to be subrogated to the rights of the mortgagee, who held his mortgage upon the property unaffected by the homestead right, which, in fact, so far as that debt was concerned, had no existence. They are not, as in *Hall v. Morgan*, subsequent purchasers of a part of the incumbered property. They are not, as in *Casebolt v. Donaldson*, 67 Mo. 311, seeking to subject to their claim a surplus of money in the hands of a purchaser of the homestead under a deed of trust, executed by the person having the homestead right, but they assert the right while the mortgage is a subsisting incumbrance to levy their attachment and run their execution against the homestead, and have the equity of redemption, say two thousand dollars, charged with its proportion of the mortgaged debt, and the balance applied in payment of their claim, and thus extinguish all right of a debtor to a homestead.

In *Morgan v. Stearns*, 41 Vt. 398, the court said: "The essential condition of this right and interest is ownership and occupancy by the husband and the family, and the statute applies to an equitable, as well as legal, ownership, an incumbered as well as an unincumbered estate." Our statute, section 2691, recognizes the right

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to a homestead in an equity of redemption, and we are not impressed by the argument based upon the distinction between a mortgage and a deed of trust, "that the mortgage passes the title and a deed of trust does not." If the claimant has a homestead in an equity of redemption, we perceive no good reason why he has not in the premises, subject to the deed of trust. He may sell his homestead. His creditors have no concern with it. He may give it away, and they are not prejudiced. He cannot commit fraud upon them by any disposition he may make of it. If he occupies a dwelling house as a homestead of eighteen square rods or less, of a value exceeding three thousand dollars, the excess may be reached by creditors on execution, and the balance in money or kind, by the provision of the statute, constitutes his homestead. If creditors may thus reach the excess on execution, why may he not sell that excess to a creditor without forfeiting his homestead right in the balance? Why may he not mortgage it to a creditor if he may sell it, without losing his homestead right? He may dispose of his homestead at his pleasure and the excess of the value or quantity is his at his disposal, the same as other property he may own detached from the homestead. As to such property he stands precisely as to any other owner of property.

The opinion of the court of appeals was delivered by Thompson, J., and it is with some hesitancy, and only after a careful examination of the authorities, that we have come to a conclusion different from that reached by that court. The judgment is reversed. All concur, except Norton, J., who dissents.

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MARTIN et al., Plaintiffs in Error, v. COLBURN.

1. **Married Woman : SEPARATE ESTATE.** Where land or other property is purchased by a husband with the proceeds of his wife's separate estate, it is in equity her separate estate, unless her intention to the contrary is shown, and this is the case although the title was taken in his name.
2. **Separate Estate : CONVEYANCE OF.** A wife cannot convey land although it is her separate estate, without her husband joining in the conveyance. (Black and Sherwood, JJ., dissenting).

Appeal from Cass Circuit Court. — HON. NOAH M.
GIVAN, Judge.

REVERSED.

W. O. Cunningham and A. Comingo for plaintiffs
in error.

(1) The deed by which Mrs. Martin acquired title creates in her a pure, legal estate; and it is not competent, under the peculiar facts disclosed in this case, to assail or change the title with which she is invested. This could only be done by charging fraud or mistake in the execution of the deed to her, which is not pretended. Parol and other evidence designed and tending to show that she might have been invested with a separate estate was, therefore, not competent, and it was error to admit it. *Tisson v. Ins. Co.*, 40 Mo. 33; *Young v. Coleman*, 43 Mo. 179; *Jennings v. Brizendine*, 44 Mo. 332; *Schaffroth v. Ambs*, 46 Mo. 580; *Paul v. Leavitt*, 53 Mo. 595; *Morrison v. Thistle*, 67 Mo. 596; *Pearle v. Harvy*, 70 Mo. 160, 167. (2) A wife cannot convey her separate estate without her husband joining in the conveyance. R. S., sec. 669; *McChesney v. Brown, etc.*, 25 Gratt. 400; *Burging v. McDowell*, 30 Gratt. 244; *Townsley v. Chapin*,

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12 Allen, 476; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Ewing v. Smith*, 3 Desaussure, 417; *Sherman v. Turpin*, 7 Cald. 382; *Gray v. Robb*, 4 Heisk. 74; Story's Equity, secs. 1391-2; 2 Bishop on Married Women, sec. 167 *et seq.*; *Parent v. Culerand*, 64 Ill. 99; *Bressler v. Kent*, 61 Ill. 426; *Cole v. Van Riper*, 44 Ill. 58; *Shumaker v. Johnson*, 35 Ind. 34; 52 Ind. 68. (3) Under the evidence in this case, the land was not the separate estate of the wife, but was her legal estate.

Boggess & Moore for defendant in error.

(1) The property involved in this suit was the wife's separate estate. 3 Pomeroy's Eq. secs. 1103-4; *City, etc., v. Hamilton*, 34 N. J. E. 158; *Beal's Ex'r v. Storm*, 26 N. J. E. 372; *Klenke v. Kaltze*, 75 Mo. 239. (2) Parol evidence was admissible to show the land was the wife's separate property. 3 Pomeroy's Eq. secs. 1103-4. (3) A wife can convey her separate estate without her husband uniting in the conveyance. *Whitesides v. Cannon*, 23 Mo. 457; *Sharp v. McPike*, 62 Mo. 300; *Claflin v. Van Wagoner*, 32 Mo. 252-4; *Schafroth v. Amb's*, 46 Mo. 114-116; *Tuttle v. Hoag*, 46 Mo. 38-43; *Coughlin v. Ryan*, 43 Mo. 99; *Bruner v. Wheaton*, 46 Mo. 363-366; *Kimm v. Weippert*, 46 Mo. 532; *King et al. v. Mittalberger*, 50 Mo. 182-185; *Bank v. Taylor*, 53 Mo. 444-449; *Meyers v. Van Wagoner*, 56 Mo. 115; *M'Quie v. Peay*, 58 Mo. 56-59; *Welch v. Welch*, 63 Mo. 57; *Plass v. Thomas*, 6 Mo. App. 157; 1 Bishop on Married Women, secs. 852-3; *Ib.* 863; *Slaughter v. Glenn*, 98 U. S. 242-6.

HENRY, C. J.—Plaintiffs sued defendant in ejectment for the possession of eighty acres of land in Cass county which the wife had conveyed to the defendant by deed in which her husband did not join. The defence was a general denial and also special, setting up the fact that it was real estate held by the wife as her separate property, although that fact did not appear upon the face of the

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deed, but was established by evidence *aliunde*. There was a judgment for defendant, from which plaintiff has appealed. The defendant and two other parties by their joint deed conveyed this land to Mrs. Martin on the eleventh of February, 1875, and the evidence tends to prove that it was purchased by her with the proceeds of property which was devised to her by her father, to her sole and separate use. On the twenty-eighth of January, 1875, her husband executed and acknowledged an instrument of writing which recited the provisions of said will, and that Mrs. Martin had become the owner of land in Cass county as her separate estate, and had desired him to assume its management, and declaring that he had no interest, he undertook to manage and control it as she might in writing request, for her sole and separate use.

While the paper does not specify what land in Cass county she had acquired, and in fact she had then received a deed for none, yet considering all the facts and circumstances, no doubt can be entertained that it either related to the land purchased of defendant, embracing the eighty acres in controversy, or to such lands as she might thereafter acquire in Cass county. In these respects the case bears some resemblance to that of *Klenke v. Keltze*, 75 Mo. 239. Where land or other property is purchased by the husband with the proceeds of his wife's separate estate, whether the title is taken to her or to himself, it is in equity her separate estate unless her intention to the contrary is shown. 3 Pom. Eq. secs. 1103, 4; *City Nat. Bank v. Hamilton*, 34 N. J. E. 158. We are of the opinion that Mrs. Martin had in equity a separate estate in the land in controversy, and shall proceed to consider a question of more difficulty, viz: Whether by her own deed, her husband not joining her in executing it, she could convey the land? In England the law has fluctuated on this subject, as will be seen by an examination of the opinion of Judge Leonard in the case of *Whitesides v. Cannon*, 23 Mo. 457, and that of Green, J.,

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in the case of *Radford v. Carwill*, 13 W. Va. 573, in which the vacillations of the English courts are very ably traced. But in this country the adjudications are nearly all one way. In some of the states statutes have been enacted empowering a married woman to convey real estate held by her as her separate property by deed without joining her husband, as in Maine, Michigan and Massachusetts. Except in states in which the statute has empowered the married woman, I have found no case in the United States recognizing her right to convey real estate by her own deed where that was the precise question for determination. "This species of property, whether in things real or personal, is exclusively the creature of a court of equity." Judge Leonard in *Whitesides v. Cannon*, *supra*.

In equity it is chargeable with her debts, while at law she can contract no debts. Her debts are not liens upon her separate property "by any power of appointment, but by the decree of a court of equity making them such." Lord Cottingham in *Owens v. Dickerson*, 1 Cr. & Ph. 48. Her power to charge her separate estate is not based on the *jus disponendi*. In fact she does not charge it, but equity does it for her. *Davis v. Smith*, 75 Mo. 219. The whole doctrine on the subject lies within the domain of equity. It is urged that if the power to subject her land to the payment of debts she may contract be conceded, then logically she should have the power to do that directly which she may accomplish by indirect means. Numerous cases recognize the distinction between incumbrances as created by deed and liens or charges enforced in equity; and there is this difference between incumbrances placed by the married woman upon her real estate, and those charges which are established as liens against it by courts of equity, that in the former transaction she has no one to protect or guard her interest, while in the latter the court of equity which estab-

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lished the charge will not do it unless it would be inequitable to refuse it. I am aware that the language of Judge Leonard in *Whitesides v. Cannon*, *supra*, is broad enough to countenance defendant's contention here, but that was not a case in which the *femme covert* had executed a deed or mortgage, but had joined her husband in a promissory note for the payment of which it was sought to subject her separate real estate. What he said was *arguendo*, and how he would have decided the precise question now before us we can only conjecture. *Kimm v. Weippert et al.*, 46 Mo. 532, was a similar case. Certain it is that it has not been the practice of conveyancers in this state to prepare deeds for married women to execute, conveying their separate real estate without joining their husbands. *Whitesides v. Cannon*, was decided twenty-nine years ago, and I doubt if any married woman within that period has attempted in this state, except in this case, to convey her separate real estate by deed without joining her husband. No such case has ever been in this court. The weight of authority against the proposition is overwhelming. In Story's Equity (11 Ed.) sec. 1392, Judge Story says: "As to this the received doctrine seems to be, that if an estate is during coverture given to a married woman and her heirs for her separate use, without more, she cannot in equity dispose of the fee from her heirs, but she must dispose of it, if at all, in the manner prescribed by law." To the same effect is Roper on the Law of Husband and Wife, Vol. 2. 184; *Wright v. Brown*, 44 Pa. St. 237; *Peck v. Ward*, 6 Harris (18 Pa. St.) 508; *Thorndell v. Morrison*, 1 Carey (25 Pa. St.) 326; *Stoops v. Blackford*, 3 Carey (27 Pa. St.) 218; *Harrison v. Stewart*, N. J. Eq. 3 Green 451; *Armstrong v. Ross*, 20 N. J. Eq. 110; *Pentz v. Simpson*, 2 Beasley, 235; *McChesney v. Brown's Heirs*, 25 Grat. 400; *Gray v. Robb*, 4 Hick. 74; *Sherman v. Turpin*, 7 Caldwell (Tenn.) 332; *Miller v. Wetherby*, 12 Iowa, 420; *Dodge v. Hollinshead*, 6 Minn. 25; *Miller v.*

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Hine, 13 Ohio St. 565. And the statutes of those states which expressly confer upon the *femme covert* the power to convey by her sole deed, are recognitions that but for the statute she had no such power, and in most of their adjudications upon cases under those statutes it is conceded that but for such express legislation the married woman has not the *jus disponendi* of her separate real estate.

Our statute authorizes the conveyance of the wife's real estate by the joint deed of herself and her husband. At common law it could only be done by suffering a fine, or common recovery, and now since they are abolished she derived all her authority to convey her land from the statute. As remarked by Judge Black in *Peck v. Ward*, 6 Harris (Pa. St.) 508: "The salutary rule is, therefore, in full force, which forbids anyone taking title to the wife's property, unless it be conveyed by deed, not only with her own free consent, but under the protection and by the advice of her husband. This is necessary to the happiness and interests of both." The statute was intended to shield her against any indiscretions into which her inexperience might lead her, with respect to her property; to protect her against the schemes of designing persons who might covet her estate, and, above all, to preserve harmony and happiness in the household which might be seriously disturbed by the conveyance of her real estate, by the wife, without consulting, or, as in this instance, against his remonstrance.

Conceding, for the argument, the logical result of the doctrines of the courts of equity in relation to charging the debts of a married woman against her separate estate, to be as contended by appellants' counsel, I am not aware that that logical result has been reached by the adjudication of any court of last resort in this country where that was the precise point involved; certainly no such case has been cited by counsel; whereas, in numerous cases, involving the identical question, the contrary has been expressly ruled. In equity, however, defendant may

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have the amount he paid to Mrs. Martin for the land and improvements made by him charged against it.

The judgment is reversed and the cause remanded with directions to dispose of it as herein indicated. Norton and Ray, JJ., concur; Black and Sherwood, JJ., dissent.

BLACK, J., DISSENTING.—I dissent from the proposition that a deed of a married woman conveying her separate estate is of no validity unless the husband is a party thereto. The powers of a married woman over her separate estate are, it would seem, in some of the states limited to the express terms of the instrument creating the estate. The very reverse is the English, as well as the rule of this state. 1 Lead. Cas. Eq. 405. The majority opinion quotes from Story's Eq. sec. 1392. I understand the author there to speak of an exceptional case, *i. e.*, where the separate property is given to the wife by a third party during coverture without the appointment of a trustee; as to which it is said, "The received doctrine is that if the estate is given to her and her heirs for her separate use, without more, she cannot in equity dispose of the fee from her heirs; but she must dispose of the same, if at all, in the manner prescribed by law, as by a fine." But it is also stated that if a clause be added, giving express power to convey, then courts of equity will treat such power as enabling her effectually to dispose of the estate notwithstanding no trustees are interposed. The reason for the distinction is, it is also stated, that the terms, "for her separate use," are not supposed to indicate any intention to give her more than the sole use and power of disposition of the profits of the real estate during the life of her husband. The same author previously, and in section 1390, says, "It may be now laid down as a general rule that all ante-nuptial agreements for securing to the wife a separate estate will, unless the contrary is stipulated, give her full power of disposing

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of the same whether it be real or personal property, the same as if she were a *femme sole*."

Now in the first place, I do not see how the distinction thus made in the text of Story can aid the plaintiffs in this case, for the right of the wife to alienate the rents and profits for the life of the husband, is clearly recognized, and that would defeat this action. In the next place does any such a distinction exist in this state? The established doctrine is that to create a separate estate with all the powers that can or do attach thereto, the interposition of a trustee is not necessary. *Schafroth v. Ambs*, 46 Mo. 116; 60 Mo. 442. If adequate words are used to create a separate estate, the powers and incidents of such estates follow, and we look to the instrument, not for a specification of the powers, but rather for limitations upon them. Even if a particular mode of disposition is pointed out that will not preclude her from any other unless restrained to the very method pointed out. *Kimm v. Weippert et al.*, 46 Mo. 536; *Green v. Sutton*, 50 Mo. 191. When the separate estate has been subjected to the payment of debts of the married woman, the relief has been extended to the entire separate estate and not limited to the rents and profits during the life of the husband. It is clear the distinction before noted has never been recognized in this state, and the general rule as stated by that eminent author applies in this state whether the separate estate be created before, after, or in contemplation of immediate marriage, and it can make no difference that the estate is given to her by a third person. The important inquiry is: Has she a separate estate? If she has, the powers and incidents follow unless expressly limited. The doctrine of *Hulme v. Tenant*, 1 Bro. Ch. 20, where it was said "a *femme covert* acting with respect to her separate property is competent to act in all respects as a *femme sole*," has certainly been adopted as the doctrine of this court. The subject was thoroughly considered by Judge Leonard in *Whitesides*

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v. Cannon, 23 Mo. 457, and the result reached "that if the trust be for the wife's separate use without more, she has an alienable estate independent of her husband, which she may dispose of as a *femme sole* owner, and that she has the other power incident to property in general, the power of contracting debts to be paid out of it." Subsequent cases following that assert in unequivocal language that a married woman possessing a separate estate is as to that a *femme sole*, and in equity is as completely clothed with the power of disposition as any other property owner. *King v. Mittalberger*, 50 Mo. 185; *DeBaun v. Van Wagoner*, 56 Mo. 347; *M'Quie v. Peay*, 58 Mo. 56.

But it is said these remarks were made in cases brought to subject the separate estate to the payment of debts, and did not involve the question now before the court. The most casual reading of *Whitesides v. Cannon* will show that the *jus disponendi* is at the very foundation of the whole doctrine of separate estates of married women. Having the power to deal with her separate property, she has the incident, *i. e.*, the power of contracting debts to be paid out of it. 1 Lead. Cas. Eq. 399; Story on Eq. sec. 1397. The majority opinion gives a recognition to the incident, but for the first time in the jurisprudence of this state denies the existence of the very foundation principle upon which the incident has always been made to rest. That the rulings in the different states are diverse upon this subject is, we suppose, well understood. This is due in part to the want of similarity in the statute laws. These laws, often taken as a whole, indicate some general policy which the courts seek to enforce. Again, in the absence of any statute, many of the states have followed or pursued a different line of adjudications. This is enough to show the importance of adhering to our own adjudications when well understood, as it is believed they are. When this court has said again and again that a married woman

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as to her separate property is a *femme sole*; that as to such property she has the power in equity to sell and dispose of the same independent of her husband, how can it be said the court did not mean what was thus stated as the law? It is because of the *jus disponendi* that a defective deed of trust was held to be an equitable mortgage in *M'Quie v. Peay*, 58 Mo. 56. This is the more apparent by contrasting that case with *Heard v. Taubman*, 79 Mo. 102. Mr. Bishop in his *Law of Married Women*, vol. 2, sec. 163, says that the proposition that "in equity a married woman is considered as a *femme sole* in respect of her separate property," plainly includes the narrower one that she can sell and convey such property by her own sole act without her husband, the same as if unmarried. The same author in speaking of the form of the conveyance, at section 185, vol. 2, says: "In the absence of any express provision in the deed of settlement, the leading doctrine is that the wife acts as a *femme sole* in the disposition of her separate equitable estate; consequently that any form of conveyance which would bind her or the estate in equity if she were unmarried, will be good though her husband does not join in it, and though there is no privy examination." Citing *Sturgis v. Corp*, 13 Ves. 190; *Wagstaff v. Smith*, 9 Ves. 520; *Pybus v. Smith*, 1 Ves. Jr. 189; *Fetiplace v. Gorges*, 1 Ves. Jr. 46; *Powell v. Murray*, 2 Edw. Ch. 636; and *Leaycraft v. Hedden*, 3 Green Ch. 512. The statute which provides that "a husband and wife may convey the real estate of the wife, etc., by their joint deed," etc., is an enabling statute designed to give them power to convey the wife's general property in which the husband has a marital interest. I am not aware that it has ever before been regarded as a disabling statute. The remarks made in *Luff v. Price*, 50 Mo. 228, would clearly indicate that the statute did not interfere in the least with the wife's power over her separate property. I hold that it does not. The answer in this case sets

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up an equitable defence ; that defence properly prevailed in the trial court. Sherwood, J., concurs.

CARROLL V. MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

1. **Negligence: RAILROAD: PASSENGER.** A drover transported over a railroad on a pass for the purpose of taking care of his stock on the train is a passenger, and the railroad cannot stipulate for exemption from liability for injuries to him caused by its negligence.
2. **Master and Servant.** The trial court held to have rightly declared as a matter of law, that the relation of master and servant did not exist between the railroad and deceased in this case.
3. **Constitution: REVISED STATUTES, SECTION 2121.** The second section of the damage act (R. S., sec. 2121) which authorizes the recovery of five thousand dollars in cases of death of persons occasioned by the negligence of railroads, etc., is constitutional.
4. **Action by Wife for Death of Husband: COLLECTION OF INSURANCE MONEY BY HER.** The fact that plaintiff's husband had his life insured, payable to her, and that after his death she collected the insurance money, is no defence to an action on said statute.
5. **Instruction.** The assumption in an instruction of the existence of a fact as to which there is no controversy, is no ground for a reversal.

Appeal from Cooper Circuit Court.—Trial before HON. J. P. STROTHER, Judge of the Sixth Judicial Circuit.

AFFIRMED.

T. J. Portis for appellant.

(1) The court erred in striking out the special defences set up in defendant's amended answer. The special contract pleaded was a valid defence. *Daer v.*

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New York, etc., 1 Kern. 485; *Wells v. Railroad*, 24 N. Y. 181; *Perkins v. Sorne*, 24 N. Y. 196; *Bigsell v. Railroad*, 25 N. Y. 442. No principle is better settled than that a party to whom any benefit is secured by contract, by statute, or even by the constitution, may waive such benefit, and that the public are not interested in protecting or benefiting him against his wishes. *Broom's Legal Maxims*, 309; *Lee v. Tillotson*, 24 Wend. 337; *People v. Murray*, 5 Hill, 468; *Donnelly v. Corbitt*, 3 Selden, 500; *Hill v. Railroad*, 29 Am. Rep. 163, note; *Duff v. Railroad*, 41 L. J. (N. S.) 197; *Kinney v. Railroad*, 34 N. J. L. 513. (2) The court erred in striking out the first paragraph of the answer, for it averred that by virtue of the terms of said contract Carroll made himself an employe of defendant and a fellow servant of its employes. (3) The statute on which this action is brought is unconstitutional. Const. U. S. 14th Amend., sec. 1; Const. U. S., art. 7; Const. of Mo., art. 2, sec. 30. (4) The instruction for plaintiff was erroneous, because it does not require the jury to find that deceased was a passenger on defendant's train.

L. F. Wood and Draffen & Williams for respondent.

(1) The special contract set up in the answer constituted no defence to defendant's own negligence. *Railroad v. Lockwood*, 17 Wall. 357; *Railroad v. Selby*, 47 Ind. 471; s. c., 17 Am. Rep., 719; *Railroad v. Henderson*, 51 Pa. St. 315; *Railroad v. Stephens*, 95 U. S. 655; *Lemon v. Chanslor*, 68 Mo. 340. (2) The court did not err in striking out that part of the answer which alleged that the deceased had made himself an employe of defendant, and a fellow servant of defendant's employes. *Flinn v. Railroad*, 1 Houston, 469; *Lackawanna, etc., Ry. v. Chenowith*, 52 Pa. St. 382; *Dritt v. Snodgrass*, 66 Mo. 286; *Curran v. Downs*, 3 Mo. App.

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468; *State, etc., v. Williams*, 77 Mo. 463. (3) The second section of the damage act is constitutional. Cooley's Const. Lim. 581, and note 2; *Barnett v. Railroad*, 68 Mo. 56; Field on Damages, 12. (4) There was no error in plaintiff's instruction. *Sherman v. Railroad*, 72 Mo. 62; *Lemon v. Chanslor*, 68 Mo. 340. It was not necessary to tell the jury in express terms that deceased was a passenger, there was no pretense he was an employe. When it is clear and undisputed, an instruction may assume the truth of the matter sworn to. *Barr v. Armstrong*, 56 Mo. 577; *Caldwell v. Stephens*, 57 Mo. 589. (5) There is nothing in the defence that plaintiff had collected two thousand seven hundred dollars insurance money. May on Insurance, sec. 455.

RAY, J.—This is an action by Sarah J. Carroll, as the widow of Hugh A. Carroll, deceased, for the death of her said husband, occasioned by the negligence of defendant and its servants in the management of its trains. The petition in substance, and as far as we now deem material to notice, alleged that on the thirty-first of May, 1881, said Hugh A. Carroll, under the rules and regulations of defendant, and in compliance with defendant's terms, shipped one car load of stock on one of defendant's freight trains from California to St. Louis, and took passage himself on the same train, in compliance with the rules and regulations of defendant; that on the morning of the thirty-first of May, 1881, said train on which Carroll and his stock were being carried, reached the town of Washington, in Franklin county, Missouri, on its way to St. Louis; that said Carroll continued thereon as a passenger, in accordance with his contract with defendant, as aforesaid; that at the town of Washington, in Franklin county, Missouri, by reason of the carelessness, negligence, unskillfulness, and mismanagement of defendant's agents, officers and employes, whilst running,

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conducting and managing said locomotive and train of cars, on which said Carroll had taken passage as aforesaid, and, also, by reason of the carelessness, negligence, unskillfulness and mismanagement of defendant's officers, servants, agents and employes, whilst running, conducting and managing another locomotive and train of cars, at the time and place last aforesaid, the said two trains collided, and by reason of said carelessness, negligence, unskillfulness and mismanagement of the defendant's officers, servants, agents and employes, whilst managing said locomotives and trains as aforesaid, said Hugh A. Carroll was instantly killed in said collision, and that by reason thereof plaintiff was entitled to recover the sum of five thousand dollars damages, and for which she asked judgment.

The amended answer of the defendant, after denying generally all of the allegations of the petition, not afterwards expressly admitted in said answer, set up three special defences: "First. That said Carroll on the thirtieth of May, 1881, under a written contract with defendant, shipped one car load of horses over defendant's road from California to St. Louis, and took passage himself, on the train that carried said stock, under and by virtue of the terms of said written contract; that by said contract he was to be carried upon said train for the purpose of taking care of his said stock, and was to be at his own risk of any personal injury from any cause whatever, and that he was required to sign a release to that effect, which he did; that he signed this release as a condition precedent to his right to ride upon said train, and that by reason of his traveling upon said contract to assist in taking care of said stock, he became an employe of the defendant, and to that extent a fellow servant of the men in charge of defendant's trains. Second. The second special defence was that the section of the damage act, upon which this suit was predicated, was unconstitutional because the amount of the recovery

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was fixed at five thousand dollars. Third. That plaintiff's husband had his life insured for twenty-seven hundred dollars, payable to her, and which, after he was killed, she collected." The court, on plaintiff's motion, struck out that portion of the answer containing the special defences above mentioned.

As we understand the record, there was no controversy at the trial as to the facts in the case. The husband of plaintiff was killed while riding on one of defendant's freight trains, upon a stock drover's pass, or contract, in charge of, or accompanying, a car load of horses which he had shipped on defendant's railroad. Under the rules of defendant, said Hugh A. Carroll became entitled to said drovers' pass or stock contract, in virtue of his said shipment of said car load of stock on said train, and defendant's conductors of such trains received and accepted such stock contracts as passes or tickets over the railroad. A collision occurred between said train upon which said Hugh A. Carroll was thus traveling, and another freight train of defendant, through the negligence of defendant and its servants in the management thereof, and the death of said Carroll resulted therefrom. The defendant offered no evidence, but demurred to that introduced by plaintiff, which demurrer to the evidence was overruled. No instructions were asked by defendant, and but one was given on the part of plaintiff, which was as follows:

"The jury are instructed that if they believe, from the evidence, that defendant's agents and servants whilst operating a train of cars on defendant's railroad, negligently and carelessly caused one of defendant's trains to collide with another train, upon which Hugh A. Carroll was riding, and that by reason of said collision, and as a consequence of such negligence, said Carroll was killed, and that the plaintiff is his widow, then the jury will find for plaintiff and assess her damages at the sum of five thousand dollars."

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There was a verdict and judgment for plaintiff for five thousand dollars, from which defendant has prosecuted this appeal.

The matters urged upon us by defendant for reversal of said judgment grow out of the action of the circuit court in striking out the special defences set up in the answer, and in giving said instruction set out as above. The first of said questions involves the validity of the special contract set out in the first of the special defences set up by the answer. This special contract, which was assented to and signed by the deceased husband, provided that: "For the purpose of taking care of the stock the owner, or men in charge, will be passed on the train with it, and all persons thus passed are at their own risk of any personal injury from any cause whatever, and must sign release to that effect endorsed on contract." The endorsement required and referred to was as follows: "We, the undersigned owners, or in charge of the live stock mentioned in the within contract, in consideration of the free pass granted us by the Missouri Pacific Railroad Company, hereby agree that the Missouri Pacific Railway Company shall not be liable to us for any injury or damage of any kind suffered by us while in charge of said stock, or on our return passage." The action of the wife, we may observe, was for the death of the husband, occasioned by the defendant's negligence, and the question is as to the validity of the agreement made by the husband exempting the defendant from injuries caused by its negligence, the collision of the trains as we must assume, after verdict being due thereto. The right of common carriers of goods and passengers to thus contract against their own negligence, has repeatedly been before this court in a variety of ways and has heretofore been denied upon grounds of public policy. *Dawson v. Railroad*, 79 Mo. 296; *Harvey v. Railroad*, 74 Mo. 541. Like stipulations and exemptions in stock contracts substantially similar were involved

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and passed upon in the case of *Railroad v. Lockwood*, 17 Wall. 357, where, upon an extended review of the cases, the Supreme Court of the United States held, also, that a common carrier cannot stipulate for exemption from liability from its own negligence, that the rule applied to the common carrier of goods and of passengers for hire, and that a drover transported over the railroad upon a pass, for the purpose of taking care of his stock on the train is a passenger for hire. We are aware that a contrary doctrine or rule has been announced in cases, of which *Bissell v. Railroad*, 25 N. Y. 442, relied on by appellant, may be cited as a type; but this court has heretofore followed and adhered to the rule and doctrine declared in the *Lockwood case, supra*; *Lemon v. Chanslor, supra*; *Sturgeon v. Railroad*, 65 Mo. 569; *Rice v. Railroad*, 63 Mo. 314. It is also contended for appellant in this behalf that it was error for the court to assume that the deceased husband did not, in the face of direct allegation of the answer to that effect, make himself *pro hac vice* an employe and fellow servant, with other employes of defendant upon said trains. The answer, it will be observed, sets out the contract, and if the allegations showed upon their face that the relation of master and servant did not exist, then we think the court might rightfully, and as a matter of law, so declare. Upon the facts stated in the answer, the court drew a different conclusion from the pleadings and held, we think properly, that the deceased husband was not a servant in the employ of defendant. He received no wages, performed and was to perform no service unless it was in looking after the stock of which he was the owner, and his death did not occur while he was engaged in that behalf. He performed no duty upon the train, and was not connected in any manner with its management and operation, was not subject to defendant's orders in that behalf and owed no obedience, at least in the sense in which said duties and relations commonly exist between master and ser-

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vant. Essential features and elements necessary to constitute that relation are, we think, affirmatively shown not to exist by the facts stated in the answer, and the ruling of the trial court was not erroneous in this behalf. *Flinn v. Railroad*, 1 Houston, 469; *Railroad v. Chenowith*, 52 Pa. St. 387.

The second special defence set up in the answer challenges the constitutionality of the second section of the act concerning damages, for the reasons that said section attempts to deprive defendant of its property without due process of law, in authorizing a judgment against it as one of a special class of individuals in violation of the fourteenth amendment of the constitution of the Federal Union, and in violation of section thirty, article two, of our state constitution. And in arbitrarily liquidating and admeasuring the quantum of damages, without a trial by jury as to the amount thereof, the same being preserved to defendant by article seven of the constitution of the United States, which declares, "in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." The damage act and said section thereof, has long been in our statutes, and frequently before the court, and many recoveries have been had thereunder, and, while so far as we are aware, this section has not been heretofore assailed in this court upon these or other grounds, yet the same argument and constitutional objections that the damages are arbitrarily fixed by the statute, would invalidate a very large number of other sections in our statutes and collated in the case of *Humes* against this defendant, 82 Mo. 228-9. Indeed, the constitutional objections here raised have been heretofore urged against, or apply in principle to other sections and provisions in our law, and notably to the section known as the forty-third section of

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the railroad law, the constitutionality of which in respect to both state and federal constitutions, has been repeatedly affirmed. *Barnett v. Railroad*, 68 Mo. 56; *Meyers v. Union Trust Co.*, 82 Mo. 237, and *Humes v. Railroad*, 82 Mo. 221, which last mentioned case has been recently affirmed in the Supreme Court of the United States. As already said, the objections as to said section being special or class legislation, has also been overruled by the adjudications of this court. We deem it unnecessary to extend argument on this branch of the case.

The defence set up in the third paragraph, and stricken from the answer by the court, to the effect in substance that the plaintiff had collected twenty-seven hundred dollars life insurance upon a policy, taken out by the husband in his lifetime for the benefit of the plaintiff, has been assigned as error and presented, but there is no argument or citation of authority in that behalf in the brief of counsel. The proposition involved, however, as we suppose it to be, is that the negligent and wrongful act resulting in the death of the plaintiff's husband, is the occasion of pecuniary benefit to the plaintiff in the amount of damages recovered, or authorized to be recovered, and that the insurance money received by plaintiff inures to the benefit of the defendant and becomes a defence *pro tanto*. But the pecuniary benefit, if it could in any event be so considered, derived from the husband's death would, we may justly presume, have been probably more than realized by the continuation of the husband's life. At all events, the amount of the damages in actions under said second section of the damage act, commonly so called, is fixed by the statute, and is expressly conferred upon the beneficiaries named in this case, upon the wife, and the construction of appellant, if allowed, would defeat or modify actions under the statute, where the party killed had, by his own prudence and at his own expense, sought to provide for the maintenance of his family in the event

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of his death, and would enable the wrong doer to protect himself to the extent of the insurance against the consequences of his own wrongful and unlawful acts. As against this plaintiff in this action upon the statute for the damages for the death of her husband, we think the matter thus set up in the third special defence was irrelevant and immaterial, and the action of the court in striking it out, was, we think, right and proper. *Sherlock v. Alling*, 44 Ind. 184; *Althorf v. Wolfe*, 22 N. Y. 355; *Harding v. Townshend*, 43 Vt. 536.

As to said instruction given for plaintiff, which is criticised for the reason, and no other, that the jury are not therein required to find that the deceased at the time of his death was a passenger on the train of defendant, it is perhaps sufficient to say that such omission, if it is to be regarded as such in this case, was not, under the facts, error materially and prejudicially affecting the rights of appellant. There was no controversy, as we gather from the record as to the terms upon which deceased was received and was being carried at the time upon the train, but the controversy was only as to the legal effect of the stock contract. Under the views already expressed and authorities cited, he was not an employe, he was lawfully upon said train and was a passenger for hire, although riding at the time upon a drover's pass, and an assumption of such fact about which as a matter of law there could be no dispute under such circumstances was not error or prejudicial to defendant. *Barr v. Armstrong*, 56 Mo. 577; *Nelson v. Foster*, 66 Mo. 381; *Gray v. Missouri River Packet Co.*, 64 Mo. 47; *Sherman v. Railroad*, 72 Mo. 62.

This embraces all the questions arising on the record, and having thus considered and disposed of them, and finding no material error in the record, we affirm the judgment of the circuit court herein, and it is ordered accordingly. All concur.

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EHRlich, *Appellant*, v. THE ÆTNA LIFE INSURANCE COMPANY.

1. **Waiver.** Waiver is ordinarily a question of intention and a fact to be determined by the triers of fact.
2. — : **CONTRACT.** An acceptance of a sum of money due regardless of other stipulations in a contract, will not be regarded as a waiver of such other stipulations.
3. **Contract, Construction of.** A stipulation by one in a contract to devote his entire time and energy to the business of an insurance company and to no other, must receive a reasonable interpretation. He is bound to devote his time and energies with that degree of diligence and attention which is usual among industrious business men engaged in like business, and pursuing no other avocation.
4. **Servant, Discharge of: ELECTION.** Where a servant is wrongfully discharged by his master, he may sue for a breach of the contract or he may elect to treat the contract as rescinded, and recover on a *quantum meruit* for the services rendered.
5. **Contractor, When Prevented From Completing Work: REMEDIES.** A contractor who has been prevented by the other party from completing his work, may waive the action for damages and sue for the value of the work done and materials furnished, and he is not in such case restricted to a *pro rata* share of the contract price.
6. **Quantum Meruit: PLEADING.** It is no objection in such action that the petition sets out the contract and a compliance with its terms and the termination of the contract by defendant, provided it shows that the plaintiff elects to treat it as canceled and seeks to recover for the services rendered.
7. — : —. Where the petition counts on both the theory of a breach of the contract and a *quantum meruit*, the remedy of the defendant is by motion.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Noble & Orrick for appellants.

(1) The measure of damages, as fixed by the court

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below in the instructions given, is correct under the pleadings and the conduct of the trial in the court below. *Moore v. Mountcastle*, 72 Mo. 605; *Pomeroy v. Benton*, 57 Mo. 550; *Flowers v. Helm*, 20 Mo. 324. (2) It is not true that plaintiff sued for breach of contract and recovered on a *quantum meruit*. (3) Even if the petition only alleged general damages by reason of the breach of contract assigned, it would justify the instruction given by the court and the verdict rendered by the jury. *Moore v. Mountcastle*, 72 Mo. 605. (4) In the petition facts are stated which would entitle plaintiff to special damages, even if under a general averment of damages he would not be entitled to them. (5) The cause was tried on the theory adopted by both the respondent and appellant upon the pleadings as made, and for that reason the judgment should be sustained. *Pomeroy v. Benton*, 57 Mo. 550; *Flowers v. Helm*, 29 Mo. 324; *Leabo v. Goode*, 67 Mo. 134. (6) The amount of damages is not excessive. (7) The acceptance of the penalty by respondent paid by appellant in December, 1881, was a waiver of all breaches of the contract on part of appellant, which existed prior to such acceptance and of which respondent had knowledge at the time. *Pike v. Nash*, 3 Abbott's (N. Y.) App. 610; *Williams v. Porter*, 51 Mo. 441; *Waters v. Harvay*, 3 Houst. (Del.) 441; *Melton v. Smith*, 65 Mo. 315; *Garrison v. Dingman*, 56 Mo. 150; *Fitch v. Woodruff*, 29 Conn. If a servant has been guilty of misconduct and the master, knowing it, retains him in his service, *prima facie*, it is a waiver, and a condonation is presumed. *Ridgway v. Hungerford*, 3 Ad. & El. 171. (8) The construction by the court of appeals of the contract of September 16, 1880, as to the duty of the plaintiff under the clause requiring him to devote his entire time and energy to the business of the defendant and to no other, is erroneous and unreasonable. The plaintiff by the contract did not become respondent's

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slave. (9) The court of appeals erred in holding that a failure by appellant to report to the respondent by the tenth of the month, as required by the contract, prior to the payment of the penalty of \$172.50, constituted cause for canceling the contract by respondent in February, 1882, although appellant, for months of January and February, 1882, did make his reports, etc., as required by the contract.

G. A. Castleman for respondent.

(1) In a suit for damages for the breaches of a specific contract, there cannot be any recovery upon a *quantum meruit*. *Perry v. Barnet*, 18 Mo. 140; *Yeats v. Ballentine*, 56 Mo. 533; *Eyerman v. Mt. Sinai Co.*, 61 Mo. 490; *Cutter v. Powell*, 2 Smith's Leading Cases (4 Am. Ed.), Hare & Wallace's Notes, 40, *et seq.*, and cases cited. This was a suit for damages for the breaches of a specific contract. *Yeats v. Ballentine*, 56 Mo. 538; *Eyerman v. Mt. Sinai Am. Co.*, 61 Mo. 490. (2) In a suit for damages for the breaches of a specific contract, the measure of damages is the natural and proximate consequences, measured by the terms of the contract itself. 2 Sedgwick on Meas. of Dam. (7 Ed.) 436, side page 203. In the case at bar, upon the petition, the only measure of damages was the present value of the commissions stipulated in the contract upon the collection of renewal premiums to become due during the life of his contract upon policies in force in the territory covered by his contract. *Lewis v. Ins. Co.*, 61 Mo. 539; *Ensworth v. Ins. Co.*, 1 Bigelow, Life and Accident Rep., 645; *Ins. Co. v. Green*, 77 Ind. 590; *Nixon v. Ins. Co.*, *Ins. Law Journal* (Aug. 1882) 570; *Life Ass'n of America v. Ferrill*, 60 Ga. 414; May on Ins. (2 Ed.) 576. (3) A servant wrongfully discharged by his master has his election to sue immediately for damages for the breach of the contract of employment, or, where his

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wages are not fully paid up to the date of his discharge, he may sue upon a *quantum meruit* for services actually rendered. But, having made his election, he must stand by it. Bliss on Code Pleadings, 17; *Booge v. Ry. Co.*, 33 Mo. 212; *McCullough v. Baker*, 47 Mo. 401; *Chamberlin v. Scott*, 33 Vt. 80; *Moody v. Leverick*, 4 Daly, 401; *Polk v. Daly*, 4 Daly, 411; 2 Smith's Leading Cases, *supra*. But this election cannot be made if the contract price has been fully paid up to the time of his discharge. In such case the sole measure of damages will be the loss or injury occasioned by the breach of contract. *Moody v. Leverick*, 4 Daly, 409; *Ream v. Watkins*, 27 Mo. 516; *Stone v. Vimont*, 7 Mo. App. 281. In the case at bar plaintiff's wages were paid in full up to the date of his discharge. (4) It is the duty of an employe, improperly discharged before his time of employment expires, to make reasonable exertions to obtain other employment, and what he might have earned in other employment is competent evidence in mitigation of damages. *Lewis v. Insurance Co.*, 61 Mo. 534; *Stone v. Vimont*, 7 Mo. App. 277. (5) The difficulty or even the impossibility of an agent's employing sufficient agents both in number and efficiency to canvass the territory covered by his contract (when such is the requirement of his contract) furnishes no excuse for his failure to comply with its terms. *Lewis v. Ins. Co.*, 61 Mo. 539. (6) The construction of a written contract is a question of law for the court, and it is error to submit such a question to the jury. Charging the Jury (Thompson) sec. 12, and authorities cited; *Hudson v. Railroad*, 53 Mo. 539; *Hickey v. Ryan*, 15 Mo. 46; *Newman v. Lawless*, 6 Mo. 279.

BLACK, J.—This suit grows out of a contract made by plaintiff and the defendant dated the sixteenth of September, 1880. By the terms of the contract, plaintiff was appointed the general agent of the defendant for

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this state, Jackson county excepted, to procure applications for insurance, receive the premium thereon and on the renewals thereof and to collect renewals on existing policies. It seems the defendant had before been engaged in the insurance business in this state, but had withdrawn therefrom and by this contract it sought to re-enter the state for business. For the services of himself and his agents, the plaintiff was to have specified commissions on the premiums collected. Among the stipulations contained in the contract are the following, viz: "This contract is to continue in force and effect so long as the agreements made by said plaintiff are fully complied with. Should plaintiff fail to comply with any of the conditions or obligations of this agreement, it may be terminated by said company without delay. The books and records of the office at St. Louis are the property of the company. The plaintiff on his part, among other things agrees to devote his entire time and energy to the business of the company and to no other, and employ a sufficient number of agents to canvass the said territory named, and to see that the company is represented therein by efficient active agents; that he will account to said company on or before the tenth day of each month, or at any other time when required, for all premiums received by him or his agents; that he will furnish each year \$250,000 of new insurance during the term of four years from the date of the contract, or pay seventy-five cents for every \$1,000 of that amount which he fails to furnish; if he furnishes more than that amount in any one year he is to have credit for the excess on the next year, and if in the four years he furnishes more than the aggregate for those years then he is to have the money thus paid refunded."

The petition sets out at length the contract, and alleges a compliance with its terms, and states that on the twenty-seventh of February, 1882, the defendant, without his consent, appointed another agent for the

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territory and informed him that it had cancelled the contract, declined to send him renewal receipt for collection and required him to turn over the books, etc., to such other person. The defendant denies in its answer that plaintiff complied with the terms of the contract, but alleges that he made breach of the agreement on his part before noted, because of which it cancelled the contract and notified the plaintiff to turn the books, etc., over to another person.

The evidence of plaintiff conduces to show that he appointed the requisite number of agents, had an office and kept a clerk there at St. Louis, and generally complied with the terms of the contract, save that he did not at all times make his reports monthly and sometimes made two or three in one. Of this he says the company sometimes complained; and sometimes they said nothing; they called his attention to his negligence and he said he would do better, when perhaps he did the same thing, but when it came to the wind up, he held strictly to the contract. From his cross-examination, it appears that during the time of his agency he was engaged in buying some eight or twelve policies in the Globe Insurance Company of New York, which was in liquidation, from which he made, he says, less than \$1,000. In March, 1881, he was in New York a week on business for others. He also transacted some business by correspondence for Mr. Parsons, for which he received six hundred dollars. He seems to have informed the defendant of this trip and the officers at once made complaint of his absence. Notwithstanding these complaints he went to the Minnesota lakes and remained there from thirteenth of July until third of September. He also took some part in the organization of a riding school, but this, he says, was only to give the use of his name to another party, and that it consumed little or none of his time. The total amount of insurance taken, that is, the amount of the policies, was \$30,000, and he

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procured no new insurance after October, 1881. After several demands he remitted to the company \$172.50 in December, 1881, because of his failure to get the \$250,000 of new insurance for the first year ending September 16, 1881.

1. The first question is, did the acceptance of this check operate as a waiver of all prior breaches of which the defendant had knowledge? The court instructed that it did. Ordinarily a waiver is a question of intention, and a fact to be determined by the triers of fact. This amount was due the defendant regardless of the other stipulations of the contract. It could not be said because the defendant accepted the premiums arising from a policy issued upon an application procured by the plaintiff, that it, therefore, waived all breaches of the contract in failing to devote his time and attention to the business. Indeed the defendant appears to have been making complaint of this want of attention. Nor did the acceptance of that check operate as such a waiver, but we do not see how the defendant could thereafter claim any right to cancel the contract because of a failure to pay that particular demand at an earlier day. The authorities cited by the respondent do not support the proposition contended for. The second instruction given at the request of the plaintiff should have been refused and the defendant's first was properly refused.

2. Upon the stipulation that the plaintiff "agrees to devote his entire time and energy to the business of said company and to no other," and the evidence before detailed, with the evidence of a witness that life insurance business was very dull in the summer months, the court told the jury that the "plaintiff was required to devote only his entire time and energies during business hours to the business of defendant, and no other during those periods the jury may find from the evidence the business of life insurance as provided for in the agreement could be transacted." Mr. Wharton in his treatise

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upon the Law of Agency, section 274, says: "We cannot expect permanently from an agent that vehement and exhausting action which we can only expect occasionally from the principal. The most we have a right to expect is that degree of diligence which is usual among faithful, capable and industrious business men doing the same kind of work. When we appoint an agent this usage qualifies and shapes the agency."

This contract must have accorded to it a reasonable interpretation. It cannot be said to mean that plaintiff was bound to work twenty-four hours each day. He still had the usual and accustomed hours for rest, recreation and social duties and pleasures. He continued to be a member of the society and community in which he lived and moved with liberty to discharge the reasonable demands made upon him as such. He could not, of course, do any business for others to the neglect of the business of the defendant, or to its detriment. He agreed to devote his time and energies to the business of the defendant. This he was bound to do with that degree of diligence and attention which is usual among industrious business men engaged in a like business and pursuing no other avocation. The contract, we think, does not mean that he could devote his time to defendant's business during business hours and then conduct some other business during the other hours; nor can it be said there is any particular time of the year in which life insurance business cannot be conducted, as would seem to be indicated by the instruction. The instruction should be modified to conform to the views above expressed. Upon the evidence, as it now stands, without any evidence of usage or any other circumstance to justify plaintiff's absence for such a length of time, there was a sufficient cause for his removal. The case he makes is *prima facie* against himself and the court might well have so declared.

3. Of the defendant's instructions refused, the second as presented is too general to be of any assistance

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to the jurors ; the third is objectionable as giving undue prominence to particular portions of the evidence ; the fourth might be given ; we do not find any evidence of a failure to appoint a sufficient number of agents to fairly and reasonably canvass the state, and the others were properly refused. Had there been such evidence they would be proper enough.

4. Where a servant is wrongfully discharged by the master, he may sue for breach of the contract ; or he may elect to treat the contract as rescinded and recover on a *quantum meruit* for the services rendered. In the latter case he can only recover for the services up to the date of the discharge. *Ream v. Watkins*, 27 Mo. 516 ; Whart. on Cont. sec. 716. So a contractor who has been prevented from completing his job, may waive the action for damages and sue for the value of the work done and materials furnished, and he is not in such case restricted to a *pro rata* share of the contract price. *McCullough v. Baker*, 47 Mo. 401 ; *Mitchell v. Scott et al.*, 41 Mich. 108 ; *Fitzgerald v. Allen et al.*, 128 Mass. 234. Here the plaintiff's theory is that he undertook to build up a business, and for his services was to have twenty-five and thirty per cent. of the premiums paid the first year on renewal term policies and policies requiring annual payments ; and on the other hand he agreed to furnish a defined amount of new business, that being deprived of the benefits of the contract he should be allowed the value of the services rendered. If he is entitled to recover at all he may recover the value of his services and clerk hire estimated on the basis of furnishing his own office room, less, of course, what he received from the business and what is in his hands.

While the court instructed upon this theory as to the measure of damages it is contended that this suit is not for services rendered, but for damages for breach of contract and nothing else. It is no objection that the petition sets out the contract and a compliance with its

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terms and the termination of the contract by defendant, provided it shows that the plaintiff elects to treat it as cancelled and seeks to recover for the services rendered. The issues thus presented will be in the end the same as if the plaintiff had declared under a *quantum meruit* count. The petition states that to establish the business plaintiff "did expend his time and services and a large sum of money out of his own funds for the benefit of said agency, and by reason of the acts of defendant aforesaid plaintiff lost \$7,000, being profits which he would have made by furnishing \$1,000,000 of insurance under said contract;" it prays for \$15,000 damages, less \$1,848.15, conceded to be in the hands of the plaintiff. The petition appears to count on both theories and the remedy is by motion; if none is made we think the alleged profits should be disregarded and the suit treated as one for services.

The judgment of the court of appeals is affirmed.
All concur.

THE JULIA BUILDING ASSOCIATION, *Appellant*, v. THE
BELL TELEPHONE COMPANY.

1. **City : STREET, USE OF.** When the public acquires a street in a city, either by condemnation, grant or dedication, it may be applied to all purposes consistent with the proper use of a street.
2. **— : — : —.** It is only when the street is subjected to a new servitude inconsistent with and subversive of its proper use as a street, that the abutting land owner can complain.
3. **Telephone Poles : STREET.** The erection and maintenance of telephone poles are a proper use of a street.
4. **— : INJURY TO ADJOINING PROPERTY : DAMAGES.** *Semble*, that the owner of the adjoining premises cannot claim compensation for damages resulting thereto from such user of the street.

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5. ——— : ——— : ———. In no event would compensation in such case be allowed for speculative or contingent damages.
6. ——— : ——— : ———. Compensation could, however, be recoverable by the adjoining owner for damages resulting to his property from the unskillful and negligent conduct of the work.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Madill & Ralston for appellant.

(1) The plaintiff is the owner in fee of the western half of Sixth street between Olive and Locust streets. *Newhall v. Ireson*, 8 Cush. 595; *Nichols v. Suncork Mfg. Co.*, 34 N. H. 345; *Adams v. Railroad*, 33 Barb. 414; *Hannibal Bridge Co. v. Schaubacker*, 57 Mo. 582; *Higbee v. Railroad*, 19 N. J. 276; *Paul v. Career*, 26 Pa. St. 224. (2) The right of the city in Sixth street was a mere easement, the ownership of the fee being in plaintiff and the evidence shows that the walls placed therein, the sidewalk thereon and the area or basement enclosed thereby are exclusively the private property of the plaintiff, rightfully and lawfully there. (3) If said wall and basement are the *private property* of the plaintiff, then it follows that neither the state nor the city of St. Louis nor the defendant corporation has any rights therein for any telegraph or telephone purposes whatsoever and that no such rights as are claimed by defendant can lawfully be acquired without proper condemnation proceedings. *Williams v. Road Co.*, 21 Mo. 580; *Cape, etc., v. Renfro*, 58 Mo. 265; *Craig v. Rochester, etc.*, 39 N. Y. 404; *Broadwell v. City of Kansas*, 75 Mo. 213; *State v. Laverack*, 34 N. J. L. 201; *Higbee v. Railroad*, 19 N. J. 116. (4) The erection and maintenance of the two telephone poles complained of will obstruct the free and convenient access to plaintiff's premises for purposes of business and otherwise, as

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formerly enjoyed, as well as impair the use and enjoyment of the premises, as a place of business, weaken and impair the walls thereof, and depreciate their market and rental value to a very large extent. Under this state of facts, the latest and best considered cases hold, under the constitutional provisions declaring "that private property shall not be taken or damaged for public use without just compensation," and under laws requiring compensation to be made where lands are "injuriously affected," (construed as equivalent to "damaged") by the construction or execution of public improvements, that compensation ought to be, and must be, made. Const. of Mo., art. 2, sec. 21; *City of Pekin v. Brereton*, 67 Ill. 477; *Chicago & Pacific Railroad Co. v. Francis*, 70 Ill. 238; *Borough of New Brighton v. United Presb. Church*, 96 Pa. St. 331; *Hendrick's Appeal*, 103 Pa. St. 358; *City of Denver v. Bayer*, 7 Col. 113; *Beckett v. Railroad*, L. R. 3 C. P. 82; *Caledonian Ry. Co. v. Walker's Trustees*, 7 L. R. Appeal Case, 259; *Rigney v. Chicago*, 102 Ill. 64; *Transportation Co. v. Chicago*, 99 U. S. 642; *Chicago, etc., v. Stein*, 75 Ill. 41; *Householder v. Kansas City*, 83 Mo. 488; *Dusenberry v. Telegraph Co.*, 30 Hun, 480; *Tiffany v. U. S., etc.*, 67 How. Pr. 73; *Reardon v. City, etc.*, 5 West Coast Rep. 758. (5) The court improperly admitted in evidence ordinance number 10,691, offered by defendant for the purpose of showing that the excavation of the sidewalk and the building of said walls were unauthorized and illegal, because no *written permission* of the street commissioner was shown by plaintiff as required by said ordinance. (6) The defendant corporation is a mere private corporation, not subserving any public use, in any proper or legal sense of the term, which has encroached and still encroaches on the public streets and highways of St. Louis without any warrant of law whatever, and which encroachments on the said streets constitute a common nuisance, abatable and in-

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dictable at common law and under the statute. (7) Even if it be held that the defendant corporation has the statutory right to erect its poles on Sixth street, yet it proposes not only to remove the wall of plaintiff's basement, but also to put and permanently maintain its poles therein without paying any compensation. The proposed acts of the defendant corporation will amount to both a "taking" and "damage" of private property within the meaning of the constitution and laws of Missouri, as, we submit, has already been shown. In such cases an injunction will always issue, regardless of the amount of damage. *McElroy v. City of Kansas*, 21 Fed. Rep. 257; *Mason v. The Harpers Ferry Bridge Co.*, 17 West Va. 396; *The St. Louis Railroad Co. v. The Northwestern St. Louis Ry. Co.*, 69 Mo. 65; *Railroad Co. v. Owings*, 15 Md. 199.

Henry Hitchcock for respondent.

(1) This is not a case for an injunction. When an injury complained of is of obstruction to a street, it must affirmatively appear that such obstruction causes or will cause real and substantial injury. 1 High. on Inj., sec. 824; *Gay v. Mut. Tel. Co.*, 12 Mo. App. 485; *Ibid.* 494; *Bigelow v. Hartford, etc.*, 14 Conn. 565; *Hamilton v. New York*, 9 Paige, 171. (2) But even if the poles did constitute an obstruction to public travel the plaintiff could not rely thereon for two reasons. (a) Because such injury would not be peculiar to plaintiff, if plaintiff were a natural person, but would be sustained by it in common with the public generally. 1 High. on Inj., sec. 762; *Illinois, etc., v. St. Louis*, 2 Dil. 90; *Werth v. Springfield*, 78 Mo. 107; *Rigney v. Chicago*, 107 Ill. 64. (b) Because plaintiff is not a natural person, but an invisible, intangible corporation, and in the nature of things cannot walk the streets nor be obstructed in so doing by a telephone pole. (3) Equity will not grant

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relief by injunction in respect of injuries which are in their nature purely contingent upon circumstances which may or may not take place. *Flint v. Russell*, 5 Dil. 151; *Rounsoville v. Kohlein*, 15 Cent. Law Jour. ; 1 High. on Inj., secs. 742 and 743. (4) Even if the apprehended injuries are not contingent and if they could occur the plaintiff would have a sufficient remedy for them at law. 1 High. on Inj., sec. 740; Wood on Nuisances, secs. 799, 801, 812, 816, *et seq.* (5) A marked distinction exists between the extent and nature of the public uses or servitudes, to which land dedicated for a street in a populous city thereby becomes subject, and those uses or servitudes to which a country road or a village highway or street becomes subject as such. Angell on Highways, sec. 312; Thompson on Highways (Mills 3 Ed.) chap. 2, sec. 1; *Cincinnati v. White*, 6 Pet. 432; *People v. Kerr*, 27 N. Y. 201; 2 Dil. on Mun. Corp. (3 Ed.) secs. 688, 698. (6) The dedication leaves in the abutting owner his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public or by any corporation by authority derived constitutionally from the legislature. *Denniston v. Clarke*, 125 Mass. 216; 2 Dillon on Mun. Corp. (3 Ed.) secs. 678, 687; *City of Morrison v. Hinkson*, 87 Ill. 587; *Barney v. Keokuk*, 94 U. S. 340; *Transportation Co. v. Chicago*, 99 U. S. 640. (7) The street can be applied to any use reasonably incident to the public street, as such. Cases last cited, *supra*; also, *People v. Kerr*, 27 N. Y. 202-3; 50 N. Y. 206; 62 N. Y. 390. (8) Respondent is not, as appellant contends, merely a private corporation subserving no public use and, therefore, guilty of a nuisance in encroaching on the public streets.

NORTON, J.—This case is before us on plaintiff's appeal from the judgment of the St. Louis court of appeals affirming the judgment of the circuit court of the city of St. Louis, in dismissing plaintiff's bill, invoking the injunctive powers of the court to restrain and enjoin de-

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fendant from erecting and maintaining telephone poles and wires at two points on Sixth street between Locust and Olive streets in said city. The grounds for the relief sought and asked for by plaintiff, as stated in the petition, are substantially that plaintiff is the owner of a lot of ground, abutting and fronting on Sixth street in the city of St. Louis, the entire length of said street between Olive and Locust streets in said city, on which it had erected a building four stories high, used as a retail store for the sale of general, and staple and fancy merchandise; that said building above the surface of the ground extends to within about twelve feet of the curb stone of said street, and below the surface the basement story of said building extends to the line of the curb stone of said street, and is used for storing, exhibiting, packing and marking merchandise, and must be so used in order to utilise said building for the purposes for which it was built; that plaintiff, with full right and express permission of the municipal authorities of the city, did in the construction of said building, build at great cost, a heavy stone wall laid in cement, as the outer and exterior wall of the basement of said building, the outer line of said wall being Sixth street; and also built at great cost a brick wall, just inside and a few inches from said exterior stone wall; and that plaintiff, by permission of the city authorities, laid a little above the level of said street large slabs of stone about twelve feet long and several feet wide, one end of which rested on said wall, and extended back to said building, which said slabs constituted a pavement along said Sixth street and also a covering or roof for a considerable portion of said basement, and are essential to its protection. It is also averred in the petition that defendants without any authority are engaged in cutting holes through said slabs of stone, and intend to remove parts of said stone wall, and place through said holes being cut, and down in the vacancies or holes to be made in said stone wall large timbers or poles to ex-

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tend many feet above said slabs of stone, to be retained permanently, and on which are to be stretched a large number of wires to be used for telephonic purposes; that said acts, if permitted to be done, will be a continuing nuisance and constitute a continuing danger to life and property connected with said building, and the business carried on therein, and to persons and vehicles having occasion to visit said building, and will cause and result in great and daily recurring loss and injury to said premises and building and to plaintiff, for which it has no adequate remedy at law. The petition concludes with a prayer asking the court to restrain defendant from doing the acts being done and threatened to be done.

The answer of defendants denies that they are or either of them without license or authority, is or have been engaged in cutting holes in the slabs of rock, or that they are about to take out or remove parts of said stone wall as alleged in the petition, or erect and maintain poles with wires strung on the same, so as to constitute a continuing nuisance, or to the injury of plaintiff as charged in the petition. It admits that in the construction of said building, the space covered by the sidewalk on Sixth street was excavated and dug out by plaintiff and that the said sidewalk was then re-laid over said excavation, and that part of the building below the surface was so constructed by resting the walls of the building upon piers or arches with spaces under or between them, as to enable persons occupying the building to use in connection with the basement story thereof, the said excavation or hollow space under the sidewalk, and that this space is so used by the William Barr Dry Goods Company. The answer denies that the said stone wall is a part of said building, other than that it is availed of as the eastern wall of said excavation under the sidewalk along Sixth street, which wall the answer alleges was built because of said excavation and

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in order to protect the soil of said street from caving in to the injury of the street, and also to serve as a support for the eastern edge of the stone slabs with which the sidewalk or pavement was re-laid. It is then averred in the answer that the Bell Telephone Company of Missouri is a telephone corporation duly organized under the laws of the state, to which the right is given to erect and maintain poles for telephone wires along and across public roads and streets, and that since the year 1879 the said company, for the purposes of its business and the service of the public, has erected in and along the streets of the city of St. Louis more than one thousand poles, and that it has been fully authorized and permitted by the proper authorities of said city to erect and maintain poles along Sixth street, and that in pursuance of such authority to cut holes on the outer edge of the sidewalk, just inside the curbstone at two points and no more through the stone slabs constituting the pavement, on Sixth street between Olive and Locust streets, the distance between said streets being two hundred and seventy feet; that in order to securely place said poles it was necessary to cut said holes, and also necessary that portions of said outer stone wall should be removed, so that said poles might be sunk or planted to a sufficient depth to remain firm and safe against accidents; that defendant was proceeding to do this work in a careful and skillful manner with competent workmen, and that no such results would follow the execution and completion of the work, as are averred in the petition. ✓

It is shown by the evidence that the ground on which the building of plaintiff was erected had a frontage of about two hundred and seventy feet on Sixth street, and that defendant had permission of the proper city authorities to erect and maintain two telephone poles at the outer edge of the pavement, and just inside the curbstone of Sixth street, each one of them being eighteen inches thick at the bottom and tapering gradually to the

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top, and each of them being about sixty feet long ; that defendant in pursuance of this permission and authority conferred upon it by section 879, Revised Statutes, was proceeding to erect said poles and as preliminary to its doing so was proceeding to cut holes through the slab stones composing the pavement in front of plaintiff's building, and to displace and remove so much of the exterior or retaining stone wall built by plaintiff, as set forth in the petition, as would allow the insertion of said poles through said wall to the depth of several feet. It is also shown by the evidence that the excavation under the pavement was made by plaintiff with the acquiescence, if not by the express permission of the city, and I will here say that for the purposes of this case it will be assumed that such acquiescence was equivalent to express permission. It is also shown that such excavation made it necessary to build a strong retaining wall in order to prevent the earth from the street outside the pavement from caving in on the space made vacant by the removal of the earth in making the excavation. It is also shown that the lot or lots of ground on which plaintiff's house is built, as well as the land in that vicinity, was originally or formerly owned by Chouteau and Lucas, and that in 1816, Sixth street was dedicated by them for street purposes, and has ever since been used as a street ; that the plat containing this dedication was duly acknowledged and recorded ; that plaintiff is the owner in fee of the ground on which the building is erected, having acquired all the title of said Chouteau and Lucas. It is admitted that the Barr Dry Goods Company was occupying said building under a lease having some years to run, and that said company was using said building as a retail store for general and staple and fancy dry goods, and it is shown by the evidence that said company was doing a large and extensive business, and that the house was thronged daily with a great number of persons having access to the building on said Sixth street, and that hundreds of carriages were daily driven to said building

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on said street numbering as testified to as many as one thousand in one day.

Under the above state of facts it may be conceded that inasmuch as the plaintiff is the owner in fee of the land abutting on Sixth street, that it is under the laws in force in 1816, also the owner in fee to the centre of said street. While this is so, such ownership is subject to all the uses to which such street can be properly devoted under the dedication made by Chouteau and Lucas in 1816. "When one claims land as being part of a street adjoining the premises described in his deed, he cannot also insist that the land is not subject to a servitude as such street. It is only by assuming that it is a street, that he acquires any title to the land therein. And being a part of the street his title is subject to the easement over it." But it is argued that the erection of telephone poles and stringing wires upon the same as a means of transmitting oral communications instantaneously between distant points in said city is not a use to which Sixth street may, under the dedication, be properly applied, but that it is the imposition of a new and additional servitude. Hence it becomes material to determine whether such use is permissible, as the rights of the parties to this controversy in a great measure depend on this question.

A highway may be said to be nothing but an easement on the land and that the public have no other right in it than the right of passage, with the powers and privileges incident to the right. "While this rule as to the extent of the interest which the public acquires in highways is strictly true as to highways in the country, it must be taken with some limitation as to the streets of a city or large village. There are certain uses, such as the construction of sewers, the laying of gas and water pipes to which the latter are generally applied. These—called urban servitude—are the necessary incidents of streets in large cities, and are paramount to the rights of the owner in fee. Whether the streets be laid out, and

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opened upon property owned by the corporation, or whether they become public streets by dedication, or by grant, or upon compensation being made to the owner of the fee, they have all the incidents attached to them which are necessary to their full enjoyment as streets; and the corporation has the power to authorize their appropriation to all such uses as are conducive to the public good and do not interfere with their complete and unrestricted use as highways; and in doing so it is not obliged to confine itself to such uses as have already been permitted. As civilization advances new uses may be found expedient." Angell on Corp., sec. 312; Thompson on Highways, chapter 2, p. 25-7.

X
In 1816 when Sixth street was dedicated by Chouteau and Lucas to the public, St. Louis was a small French village and the necessity for devoting any part of its streets for the construction of sewers, water and gas pipes did not exist; at that time street horse railroads were unknown and the transmission of messages by means of electricity was not only unknown, but not thought of. But in the advance of civilization and the growth of the village into a large and populous city, public necessity has demanded and required the devotion of many of its streets to the above uses, and hence the laying of tracks of street horse railroads in its streets has been authorized and sanctioned both by legislative and municipal enactment, and it has been held that such use of a street is not an improper use. These streets are required by the public to promote trade and facilitate communications in the daily transactions of business between the citizens of one part of the city with those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point he is entitled to use the street, either on foot, on

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horseback, or in a carriage, or other vehicle in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than in any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen or carriages. If a thousand messages were daily transmitted by means of telephone poles, wires and other appliances used in telephoning, the street through these means would serve the same purpose, which would otherwise require its use either by a thousand footmen, horsemen or carriages to effectuate the same purpose. In this view of it the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman or carriage.

If it be true, as laid down by the authorities herein cited, that when the public acquires the right to a street, either by dedication, grant or condemnation, the municipality has the power to appropriate it, not only to such uses as are common and in vogue at the time of its acquisition, but also to such new uses as advanced civilization may suggest, as conducive to the public good, the conclusion is inevitable that the use of Sixth street in the manner and for the purposes proposed is allowable, for it cannot with any show of reason be denied, that the means these appliances would afford for the instantaneous transmission of communications for the transaction of business, without resorting to the slower and common methods of bearing them, would be conducive

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to the public good, and make the street by these means serve one of the chief purposes for which it was dedicated.

But it is argued that the erection of two telephone poles, each eighteen inches at the bottom with a gradual taper to the top would obstruct the street, and deny to the public the complete and unrestricted use of the street. This argument I think is more specious than sound. It is true, that to the extent of the space of eighteen inches each of the poles proposed to be erected would be an obstruction, but the same could be said of lamp posts erected on the streets of a city, the necessities of which might require its streets to be lighted with oil, gas, or electric lights; and yet no one would be heard to complain that the lamp posts constituted such an obstruction or impediment to the free use of the street as to demand their removal. A in walking along the pavement of Sixth street would obstruct so much of the sidewalk as for the time being he occupied, and to that extent the free and unobstructed use of the sidewalk would be denied to B walking just behind A, or immediately in front of and approaching him. The carriage or wagon being driven by C in the street would be an obstruction to the carriage or wagon being driven by D, just in front of and approaching the carriage being driven by C, and which would have to be avoided by the one or the other turning to the right or left, as the case might be, and yet each would have the right thus to obstruct the street for the time with his carriage or wagon because such obstruction is necessary to the use of the street in that way. Take the case of a street horse railroad, with its rails permanently embedded in the centre of the street, upon which its cars are placed, confined to the track between its rails, drawn by horses or mules along the entire length of its line during all the time the street is being generally used, and incapable of being turned either to the right or left, except at its tracks or turnouts, and we have a serious and permanent obstruction to the free use of the

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street by footmen, horsemen, carriages and wagons, and yet it has been held not only that such an obstruction, but railroads operated by steam, are permissible, because such methods of transportation and travel are among those to which the street may be properly applied, as not being inconsistent with its free and unrestricted use. *Randle v. Railroad*, 65 Mo. 325; *Railroad v. The City of St. Louis*, 66 Mo. 228; *Porter v. Railroad*, 33 Mo. 128; *Lackland v. Railroad*, 34 Mo. 259; *Tate v. Railroad*, 64 Mo. 150.

It is also argued by the learned counsel that defendants in making holes through the slab stones, and in removing portions of the stone wall in which to plant the poles, are invading the property rights of plaintiff in appropriating private property to public use without compensation. The ownership of the soil by plaintiff to the centre of Sixth street, being subject to all the uses to which the street could properly be devoted, and the erection of telephone poles as proposed, being one of the uses to which the street may thus be devoted, defendants, having obtained authority from the legislature as well as the city, would have had the right to remove so much of the soil (where the wall now stands) had it not been removed as to allow the poles to be securely and safely planted against accidents, and so as to answer the public purposes intended to be accomplished by their erection, without being subject to the charge of appropriating private property to a public use without compensation. The earth where this retaining exterior wall was built was the private property of plaintiff, subject, however, by reason of the dedication, to the paramount right of the public to use the street in any way to which it might be properly devoted as a street. Chouteau and Lucas, the dedicators of this street, though retaining the ownership in fee of the soil, agreed by dedicating it, that the public might appropriate so much of the soil as would make the street available for all the purposes of a street, and the

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plaintiff who claims under them, is bound by all the consequences flowing from the dedication. It, therefore, follows that if the earth composing a part of the street where the stone wall built by plaintiff now stands, had not been removed, that defendants, without infringing plaintiff's right of property, could rightfully have displaced so much of it as would have allowed the secure planting of the poles. The stone wall in question erected by plaintiff to supply the place of the earth removed, sustains the same relation to the street and the right of the public to use it that the earth itself would have sustained had it never been removed. The removal of the earth created the necessity, so far as the street was concerned, for building the stone wall, and if plaintiff's private property in the earth removed, could, before its removal by virtue of the street dedication, have been used so as to allow holes to be dug for planting telephone poles, the stone wall built to supply the place of the removed earth, though the private property of plaintiff, is nevertheless as subject to such use for street purposes, as the removed earth which it represents would have been had it not been removed.

The principle here stated is fully recognized by this court in the case of *Ferrenbach v. Turner*, 86 Mo. 416, where it was held that the city had the right to fill up wells, without compensation to the lot owners who had been permitted by the city to dig them in the streets, as affirming the doctrine announced in the case of *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121, that the city would not contract away the streets for private purposes. In the disposition of the question involved in that case, as well as in this, it is there said:

✓ "The power to regulate the use of streets is not limited to a mere right of way, but extends to all beneficial uses which the public good and convenience may require from time to time, as for laying gas, water and sewer pipes, and the like. New uses are constantly arising. All these

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uses and many others may be made of the streets without the consent of the lot owners. Private rights must yield to them. Dill. on Mun. Corp. (3 Ed.) sec. 690. So, too, the local authorities may build reservoirs and cisterns in the streets. *West v. Bancroft*, 32 Vt. 367. All these uses are to be regarded as included in the original appropriation, and it would not do to curtail the legislative power in these respects." I think it may be safely affirmed that all the authorities, to which we have been cited by counsel on both sides of this case, agree, that when the public acquires a street, either by condemnation, grant or dedication, that it may be applied to all uses consistent with, and not subversive of the proper uses of a street, and not inconsistent with the uses contemplated in the dedication, grant or condemnation, and that it is only when the street is subjected to a new servitude, inconsistent with and subversive of its use as a street, that the abutting owner can complain. The diversity of opinion is not as to the rule itself, but as to its application, that is, as to whether this or that particular use is not consistent with the proper use of the street. While in this state laying down the rails of a railroad operated by steam in the streets of a town or city, when authorized by the legislature, is deemed to be a use not inconsistent with the proper use of such streets, the courts of New York and Illinois have held otherwise as to railroads operated by steam, but not as to street horse railroads.

We have been cited to the case of the *Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507, as sustaining the proposition that the use to which Sixth street is proposed to be put is inconsistent with the proper use of said street. That case simply decides that the erection of telegraph poles along a highway in the country is inconsistent with the proper use of the highway. When the distinction between roads in the country and streets in a city, as to the urban servitude which may be imposed on the latter, is borne in mind, the opinion referred to,

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though entitled to respectful consideration, is not even persuasive authority in considering the question whether such an use of a street in a city is a proper one. But it is argued that, as by article 2, section 21, of our constitution it is provided: "That private property shall not be taken or damaged for public use without just compensation," that even though plaintiff's private property is not taken in erecting the poles in question, that plaintiff must be compensated for any damage resulting from their erection which is peculiar to its adjacent property. If the conclusions announced in the foregoing part of this opinion, that all the uses to which a street may properly be devoted are to be regarded as permitted by and included in the original appropriation or dedication of the street, and that the erection and maintenance of telephone poles as proposed, is one of these uses, and that in digging holes through the stone slabs and stone walls in which to plant them, there is no taking of private property of the abutting lot owner entitling him to compensation, are correct, it would seem logically to follow, that damages resulting from such use need not be compensated for. If by reason of the dedication the public have the right to apply the private property of the plaintiff to the use proposed, without his being entitled to compensation, how can it be that it becomes entitled to compensation for damages, flowing as an incident from an act which the dedicator by his dedication has authorized to be done?

If the dedication of the street is sufficiently operative to allow private property in the soil of the street to be actually invaded, and physically taken for a street use without compensation, why is it not sufficiently operative, if in such taking damages ensue, to relieve the taker from the payment of such damages? If by dedicating property for a street, the dedicator gives up his right to compensation for the uses included in the dedication, how can it be said that he does not also

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give up his right to compensation for damages to adjacent property not taken, resulting from the application of the street to a use which by his dedication he authorized it to be put? Without returning, but waiving an answer to these questions, let it be conceded for the purposes of this case, as is contended by counsel, that it has been held by this court in the cases of *Werth v. City of Springfield*, 78 Mo. 107 and *Householder v. City of Kansas*, 83 Mo. 488, that damages resulting from changing the grade of a street can be recovered by an adjacent lot owner, yet such damages to be recoverable, as was said by Hickey, C. J., in his concurring opinion in the case of *Rigney v. City of Chicago*, 102 Ill. 64, relied upon and cited by counsel, must be real and substantial and flow from a sudden and extraordinary change of grade, and not from such improvements of the street in any ordinary and reasonable mode deemed beneficial to the public good, for as to these the lot owner must be assumed to have consented.

The evidence in this case has failed to satisfy us that the damage against which relief is sought is of this character. That on the part of plaintiff tended to show that the action of the wind would be likely to cause the poles to vibrate so as to crumble the cement or mortar between the poles and the stone, and allow water to percolate into the basement between the stone wall and brick wall, and that if it percolated in sufficient quantities to cause dampness in the basement, the goods kept there would be injured by mould, and that this, together with the obstruction of the sidewalk with two poles, would greatly lessen the rental value of the building. The evidence on the part of defendant tended to show that it was practicable to so insert the poles that no such results would follow; that a number of poles had been so inserted in other streets of the city without any such injurious results. While the evidence of defendant tended to show that no damage would result if the work were

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done in a skillful and workmanlike manner, that of plaintiff only tended to show speculative and contingent damages resting in idea; that is, if the wind caused the poles to vibrate so as to occasion crevices, and if water percolated through these crevices in sufficient quantities to so dampen the basement as to mould the goods kept there, damages would result. If the damages anticipated should come to pass by reason of the work being done unskillfully and negligently, plaintiff would be entitled to redress. Judgment affirmed. Judges Black and Ray concurring. Henry, C. J., and Sherwood, J., dissent.

HENRY, C. J., DISSENTING.—I do not concur in the foregoing opinion. It cannot be too often repeated that: "When land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use." *Imlay v. Railroad*, 26 Conn. 255. "The grant of a right of way for one purpose, will not authorize the use of the road for another and different purpose." *Williams v. Natural Bridge, etc., Co.*, 21 Mo. 582; *Cape Girardeau, etc., v. Renfro*, 58 Mo. 265; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121. I have no doubt that when property is dedicated, or condemned, for a street, the dedicator is presumed to have in contemplation all the uses generally made of streets, and all such as the necessities of the public may subsequently require, although unheard of when the dedication or condemnation occurred; provided such additional use is consistent with that for which the property was dedicated, or condemned, in the first instance. Sewers, and gas and water pipes, may be constructed and laid in public streets, because from time immemorial, streets in cities have been so used, and, therefore, such uses of the street are presumed to have been contemplated. Streets are public thoroughfares for travel, on foot, on horseback, and in vehicles. Street railways have been allowed on streets, on the

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ground that such is one mode of traveling, and the car is a vehicle for the conveyance of passengers from one part of a city to another. Such use of the street "is not inconsistent with the public uses of a public street, but in aid of such uses." *Story v. New York Elevated Railroad Co.*, 90 N. Y. 173. It is, to some extent, an obstruction in the street. So is every wagon, buggy, and carriage, while in the street, an obstruction, but such obstruction occurs in the legitimate use of the street.

What connection, or kinship is there between traveling on a highway and talking through a telephone? Telephones might be established and operated in the city of St. Louis, if there was not a street in the city. It is true that: "The mode of using a street may and must change from time to time as the wants of commerce, or of the public, may require," but the additional use must be consistent with, and germane to, that for which it was originally dedicated, or condemned. We do not understand that this doctrine is, in express terms, controverted, but it is insisted that the planting of telephone poles in the street is not a use of the street inconsistent with that for which it was dedicated. If it is, there can be no question, under our present constitution, which forbids the taking, or *damaging* of private property for public use, without just compensation, that plaintiff has the right to have her damages assessed and paid, before the property can be used as proposed. That the damage is large or small does not affect the principle. If but one dollar, still it must be ascertained and paid to the property holder.

If planting telephone poles in the street of a city is not foreign to the use of the street for general street purposes, it is difficult to conceive what kind of a structure would not be warranted on the plea that the public interest demanded it. If one line of poles may be planted along the sidewalk, the same principle would justify the planting of a line in the middle of the street, and if one,

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then two, or as many more by competing companies, as would accomplish a total obstruction of public travel over the street; and yet, if such is a legitimate use of the street, its total destruction, as a highway, would have to be tolerated. Can the rights of property be frittered away and destroyed, and constitutional guaranties nullified by such subterfuges? If so, drop by drop, the life blood of the constitution may be drawn, and its ultimate abrogation effected. A street is not necessary to the construction or operation of telephones. If they required, as an elevated railway, a structure above the surface, which would exclude the light from the building of an abutting owner, using no more of the surface than the pole would occupy, would this be *damnum absque injuria*? That it requires no such structure, and the injury to the adjoining premises is but slight, only such as arises from the planting and maintenance of the pole, does not affect the principle. Or, suppose that the construction of a telephone required brick or stone columns occupying ten feet square of the surface of the street, could this be maintained as a legitimate use of the street? So far from a telephone being such a use of the street as was contemplated in the dedication, it is intended as and is, in fact, a substitute, in part obviating the necessity for a street, so far as the transmission of verbal messages is concerned. If the transmission of messages by messenger boys, or vehicles, was the only use for which a street would be necessary, it might be vacated on the establishment of a general telephone system in the city, without in the least interfering with the operation of a telephone.

An elevated street railway which is operated solely for the purpose of carrying persons to and fro in a city, is a use of the street more consistent with, and germane to, that for which it was condemned or dedicated, than a telephone can possibly be; yet, it was held, in *Story v. The Elevated Street Ry. Co.*, *supra*, that it was a struc-

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ture useless for general street purposes and foreign thereto. It was also held, in that case, to be a taking of private property, under a constitutional provision not so broad as ours, only forbidding the *taking* of private property for public use without just compensation, while ours also forbids the *damaging* of private property, etc. *Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507. If planting telephone poles in the street is a legitimate use of the street, the telephone company had no occasion to get permission from the city to set them in the street. Every individual, including corporations, may make any legitimate use of the street without the permission of the city, which can only regulate such use, but does not confer the right which it derived from the dedication.

There are really no disputed questions of law in this case, but the difference between us arises in the application of conceded constitutional principles. Judge Sherwood concurs with me.

THE STATE *ex rel.* WALKER V. WALKER, *State Auditor.*

1. **Agency**: REVOCATION OF. A principal can in general at his pleasure revoke the authority of his agent.
2. ———: ———. When the state employs one as its agent, it has the same power of revocation that is possessed by an individual.
3. **State Claim Agent**: REPEAL OF ACT OF MARCH 19, 1881. The appointment of one under the act of the General Assembly of March 19, 1881 (Laws, p. 163), as agent of the state to collect certain claims against the United States, was revoked by a repeal of said act.
4. ———: ———. The fact that such agent was to be compensated for his services out of the amount collected, did not confer upon him such an interest in the subject matter of the agency as to render the latter irrevocable.

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Mandamus.

PEREMPTORY WRIT DENIED.

Draffen & Williams and *Smith & Krauthoff* for relator.

(1) It was not the intention of the legislature to interfere with relator's contract by the repealing act of March 28, 1885. This is shown by the passage of the act of the same date as the above (Laws of 1885, p. 203), which expressly recognizes relator's contract as binding and obligatory, and directed that certain vouchers be turned over to him for collection under said contract. (2) The intent to give a retrospective operation to a law must be clearly expressed in order that it may receive such a construction. *State ex rel., etc., v. Greer*, 78 Mo. 188; *State v. Grant*, 79 Mo. 117. (3) The legislature did not have the power to abrogate or impair relator's contract. A state can no more enact laws to impair the obligation of a contract between the state and an individual than it can to impair contracts between individuals. *State v. Hawthorne*, 9 Mo. 389; *Fletcher v. Peck*, 6 Cranch, 133; *State v. Morrow*, 26 Mo. 131; *State v. Miller*, 50 Mo. 129; *State ex rel. v. Greer*, 78 Mo. 188; *Hall v. State*, 13 Otto, 5; *Cooley's Const. Lim.*, 273; *People v. Auditor*, 9 Mich. 326; *Davis v. Gray*, 16 Wall. 203; *Primm v. Carondelet*, 23 Mo. 22; *Bruce v. Schuyler*, 4 Gilm. (Ill.) 221, p. 278. (4) The act of 1885, providing for the payment of certain claims and directing that when paid the vouchers shall be turned over to the state's agent for collection, is not in conflict with the state constitution, article 4, section 5.

B. G. Boone, Attorney-General, *A. M. Hough* and *R. F. Walker* for respondent.

(1) The power of a legislature to repeal any law

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passed by a preceding one is unquestioned. *Cooley's Const. Lim.*, 152; 19 Mich. 259; 13 Wall. 373. (2) Offices created by the general assembly may be abolished by the latter. *Wilcox v. Rodman*, 46 Mo. 323; *Hancock v. Ewing*, 55 Mo. 101; *Benford v. Gibson*, 15 Ala. 521; *State v. Douglas*, 26 Wis. 428. (3) Mandamus is not an appropriate remedy to enforce contract rights. (4) A principal has the right to revoke the authority conferred on his agent. Story on Agency, sec. 403. (5) A person accepting office, an agency, or employment in pursuance of an act of the general assembly, does so with notice of the fact that the same may be terminated at the will of the legislature. *State v. Davis*, 44 Mo. 129; *State v. Douglas*, 26 Wis. 428. (6) Section seven of the act of March 28, 1885, is unconstitutional because in conflict with section 52, article 4, of the constitution of the state.

BLACK, J.—For the purpose of pleading, the petition, by consent, is treated as an alternative writ of mandamus, and the respondent has filed a return thereto. The act of March 19, 1881 (Acts of 1881, p. 163), gave the fund commissioners authority to employ an agent to prosecute to final settlement before congress and the departments, the claims of the state against the United States (1) for reimbursement of moneys due the state on account of expenditures and liability incurred in equipping, etc., the militia in the late war; (2) all other claims audited by the commission created by the act of March 19, 1874, and (3) claims of five per cent. of proceeds of sales of certain lands. The third section of the act directs designated state officers, on the order of the governor, to deliver to the agent accounts, pay rolls, vouchers, etc., and gives general directions as to what disposition the agent shall make of these documents. On the twenty-eighth of November, 1884, the fund commissioners entered into a contract with the relator by

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which he was appointed the agent of the state for the purpose stated in the act. He gave bond, conditioned that he would faithfully prosecute the claims to final settlement, if practicable, and that he would faithfully demean himself in the business intrusted to him. By the terms of the contract he is required to prosecute the claims at his own expense. As compensation, he is allowed five per cent. on the amount collected on certain classes of the claims, and on the others he is to receive fifteen per centum of the amount collected. By the terms of the act he is to receive his commission from the officers of the United States, and they are required to pay the residue directly to the state officers. The relator entered upon the discharge of his duties and has continued to discharge the same ever since, and has incurred large expenses and expended much time in and about the collection of the claims, and it is conceded he has faithfully demeaned himself in the business intrusted to him.

The general assembly, by the act of March 28, 1885 (Acts of 1885, p. 205), repealed the entire act of 1881 without any saving clause. The relator has demanded of the state auditor a certain voucher which the latter declines to turn over to him because of the repealing act of 1885. The claim, or voucher, in question, is one allowed by the adjutant-general since the passage of the repealing act. The question, therefore, is: did the repealing act divest the relator of his right to have and collect this voucher? His position is that the act impaired the obligation of his contract, and is, therefore, void. Contracts made between the state and an individual are as binding upon the state as if the state was an individual. It cannot impair the obligation of its own contract. As was said in *State v. Hawthorne*, 9 Mo. 390, the legislature can no more violate a contract made by themselves, or under their authority, than they can rescind or alter, or impair the obligation of one made

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between private individuals. This principle of law is well established. *State ex rel. Attorney-General v. Miller et al.*, 66 Mo. 329; *State ex rel. v. Barker*, 4 Kas. 379; *Davis v. Gray*, 16 Wall. 203, 232. Or, as was said in *Hall v. Wisconsin*, 103 U. S. 5, when a state descends from the plane of its sovereignty, and contracts with private persons, it is regarded, *pro hac vice*, as a private person itself, and is bound accordingly. As that case is much relied upon, it may be well enough to say that the governor of that state, by authority of law, employed Hall, with others, to make a geological survey of the state. By another act, Hall was made principal of the commission. His contract continued to a fixed period, and he was to receive a specified compensation and his expenses, and the expenses of his department. Before the contract expired, the legislature repealed the laws by virtue of which he was employed. He continued his work until the expiration of his contract period. In the suit, which was to recover for his services from the repeal of the laws to the expiration of his contract, it was ruled that he was not a public officer, and that he was entitled to recover notwithstanding the repeal of the laws. But do these principles of law control this case? By recurring to the act of 1881 and the contract, it will be seen that the fund commissioners were authorized to appoint an agent. Relator was thus appointed as the agent of the state for the designated purposes. His duties are, in a measure, defined by the act. His acts are to be done for and in the name of the state, and not in his own name. In short, he is, by the scope and purport of the act, made the agent of the state, to transact for it certain business. In general, the principal has a right to determine or revoke the authority given to his agent at his own pleasure, for since the authority is conferred by his mere will, and is to be executed for his own benefit and his own purposes, the agent cannot insist upon acting when the principal has

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withdrawn his confidence, and no longer desires his aid. Story on Agency (9 Ed.) sec. 463. There are exceptions to the rule, as where the power is given as a part of a security, or for a valuable consideration, but these exceptions can have no application to this case. Another exception is where the power or authority is coupled with an interest. Story on Agency, sec. 477; Whart. on Agency, sec. 95.

But the interest in such cases is an interest in the subject on which the power is to be exercised. An interest in that which is produced by the exercise of the power is not sufficient. The power must be engrafted on an interest in the property on which the power is to be exercised, and not an interest in the money derived from the exercise of the power. *Hunt v. Rausmanier's Adm'r*, 8 Wheat. 174; *Barr v. Schroeder*, 32 Cal. 609; *Coffin v. Landis*, 46 Pa. 3t. 431; *Blackstone v. Buttermore*, 53 Pa. St. 266. A power to collect money and receive property, and to sell and convey the property of the principal, the agent to have one-half of the net proceeds as compensation, is not a power coupled with an interest, and is revocable. *Hartley's Appeal*, 53 Pa. St. 212. It may be that a right has arisen in favor of the relator to be indemnified for his expenses and the like. *United States v. Jarvis*, Daveis's R. 274; *Walker v. Denison*, 86 Ill. 142. But such matters cannot be settled in this contest, even if the state could be sued. The contract in *Hall v. State of Wisconsin*, *supra*, was essentially one of ordinary employment. Here it is one of agency, pure and simple. If, as between individuals, the agency may be revoked, no reason is seen why the state may not do the same thing under like circumstances. No period of duration of the agency in question is fixed either by the statute or contract, and it cannot be that the state has lost its power to recall its agent by reason of anything in the statute or contract. We conclude the state had the right to revoke this

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agency, and that it did do so by the repealing act, which was passed with an emergency clause. There is nothing in the other act, passed on the same day, that militates against this conclusion.

The demurrer is sustained, and final judgment will be entered thereon. All concur.

HAYNES, SPENCER & Co. v. THE SECOND BAPTIST
CHURCH, *Appellant*.

1. **Contract: ABANDONMENT.** The extension of the time for the completion of a contract to make and place fixtures in a church, and the partial alteration of the work to be done, does not authorize the contractor to abandon the contract and sue for the value of the work.
2. ———: **ACCEPTANCE OF WORK.** The use of the church building for the purposes of construction does not constitute an acceptance of the work or any part of it under the contract for the fixtures, such use being contemplated by the latter contract and the duty to accept the work under it not arising until its completion.
3. **Contract to Build House: ACCIDENTAL DESTRUCTION BY FIRE: CONTRACTOR NOT RELIEVED.** Where a contractor undertakes to build a house upon the land of another and before its completion, it is destroyed by fire without his fault, he is not thereby relieved from his obligation to fulfill the contract. The obligation to build not being imposed by law, but arising from his own voluntary contract, its non-performance is not excused by inevitable accident.
4. **Contract to Place Fixtures in Building: DESTRUCTION OF BUILDING: CONTRACT, SEVERABLE WHEN.** Plaintiff entered into a contract with defendant, a church corporation, to make, finish and put in place certain fixtures in the latter's church building in St. Louis. The work was to be done according to specified plans to the entire satisfaction of the church superintendent and building committee and to be completed by December 1, 1878, under a forfeiture of ten dollars for each day's delay. As a full compensation defendant was to pay \$4800 on the completion of the work

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and the acceptance of the same. The building was, without fault of either party, destroyed by an accidental fire January 2, 1879. At that time a part of the fixtures were attached to the church and others were on the floor in the building and workmen were engaged in putting them in place. The building was at the time in defendant's possession and had been erected by separate contracts for the different departments of the work, and had been from time to time insured by defendant. *Held*, in an action by plaintiff, the contractor, for the value of the work and material in place and on the floors, that the contract was not an absolute one to do the work at all hazards, but was dependent on an implied condition that defendant was to have and keep the building ready to receive the fixtures, and to furnish room in the same for such a length of time as would reasonably be required to put them in place, and the defendant having failed to comply with said condition, the contract was severable and plaintiff could recover. \\\

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Madill & Ralston for appellant.

(1) Plaintiff having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete. Story on Bailments (9 Ed.) secs. 426*b* and 427*a*; 1 Wharton on Contracts, ch. 14, secs. 322, 300, 308, 310, 314, 326, 547 and 714 (Ed. 1882); Pollock's Principles of Contracts (1 Am. Ed.) secs. 362 to 365, pp. 411 to 414; 2 Addison on Contracts (1 Am. Ed.) sec. 869, pp. 552, 3 and 4; *Appleby v. Myers* (1867) 2 L. R. C. P. 650; *Navigation Company v. Rennie* (1875) 10 L. R. C. P. 271; *Brumby v. Smith*, 3 Ala. (New Series) 123; *Lord v. Wheeler*, 1 Gray (Mass.) 282; *Wilson v. Knott*, 3 Humph. (Tenn.) 473; *Richardson v. Shaw*, 1 Mo. App. 234; *Sinnott v. Mullen*, 82 Pa. St. 333; *Taylor v. Caldwell*, 3 Best and Smith, 826; *Sinclair v. Bowles*, 9 B. & C. 92. (2) The fact that a slight change was being made in a few of the pews, at the time of the fire, in pursuance of defendant's re-

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quest, which would have taken one man only two days to make, and was agreed to be paid for by defendant at its extra cost, did not constitute an acceptance of the work then done, or work an abandonment or rescission of the contract. Nor did the same authorize plaintiff to abandon its contract or sue upon a *quantum meruit*, as upon a general hiring, for the reasons that said change was very slight, was to be paid for at its extra cost and was not completed when the church was burnt. *Pepper v. Burland*, Peake's Rep. 139, side page 103; *Phillippi v. McLean*, 5 Mo. App. 586; *McCormick v. Conolly*, 2 Bay. 401; *Bank v. Patterson's Administrator*, 7 Cranch, 303; *Wright v. Wright*, 1 Littell (Ky.) 179; 2 Smith's L. C. (7 Am. Ed.) 50. (3) The granting or acquiescing in an extension of time does not affect the other stipulations in a special contract to build, improve or repair a house. *Nibbe v. Brauhn*, 24 Ill. 230; *Hasbrouck v. Tappen*, 15 John. 200; *Watkins v. Hodges*, 6 H. & J. (Md.) 38. (4) Revised Statutes, section 667, bars plaintiffs' action. *Sinnott v. Mullen*, 82 Pa. St. 333.

C. F. Joy, C. C. Allen and P. F. Coste for respondents.

(1) An acceptance binds the defendant to pay for what he has received; and where he has assumed control and exercised ownership over work, or where he has allowed it to be affixed to his building, he will be deemed to have accepted it. The acceptance is, of course, an implied acceptance, which, not being a voluntary expression of satisfaction with the work, as done, does not preclude a counter-claim for damages by reason of defects in the work. *Yeates v. Ballentine*, 56 Mo. 530; 2 Parsons on Contracts, part 2, sec. 5; *Thompson v. Allsman*, 7 Mo. 531; *Lee v. Ashbrook*, 14 Mo. 379; *Mar v. Richards*, 29 Mo. 105; *Lowe v. Sinclair*, 27 Mo. 310; *Lamb v. Brolaski*, 38 Mo. 53; *Creamer v. Bates*, 49 Mo. 545. (2) The defendant being in default

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in respect to its contract in not having a building in existence wherein plaintiffs could perform and complete their work under the contract, the latter can recover. *Rawson v. Clark*, 70 Ill. 656; *Niblo v. Binsse*, 1 Keyes (N. Y.) 476; *Cook v. McCabe*, 53 Wis. 250; *Lord v. Wheeler*, 1 Gray, 282; *Schwartz v. Saunders*, 46 Ill. 18; *Garretty v. Brazell*, 34 Ia. 100; *Cleary v. Sohler*, 120 Mass. 210; *Whelan v. Creek Co.*, 27 Hun, 557; *Hollis v. Chapman*, 36 Tex. 1. (3) When a party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. *Tompkins v. Dudley*, 25 N. Y. 272; *Lewis v. Atlas Ins. Co.*, 61 Mo. 534; *Hammer v. Breidenbach*, 31 Mo. 49; *Jones v. Dermott*, 2 Wall. 1; *School Dist. v. Dauchy*, 25 Conn. 530; *School Trustees v. Bement*, 3 Dutcher, 515; *Paradine v. Jayne*, Aleyn, 26; *Harrison v. Railroad*, 74 Mo. 371; 2 Parsons on Cont. 35, 673, 523.

BLACK, J.—Plaintiff and defendant, both corporations, entered into a contract by which plaintiff agreed to make, finish and put in place certain fixtures in defendant's building at St. Louis. The work was to be done according to plans to the entire satisfaction of the superintendent and building committee, and to be completed by the first of December, 1878, under a forfeiture of ten dollars for each day's delay. As a full compensation, defendant agreed to pay \$4,800 on the completion of the work and acceptance of the same. The building was without fault of either party destroyed by an accidental fire on January 2, 1879. At that time the pews in the gallery and pulpit screen had been attached to the building. The other fixtures, including the pews for lower or audience room, were in the building on the floor and workmen were engaged in putting them in place. The building was in the possession of defend-

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ant, had been erected by separate contracts for the different departments of work, and had been by defendant from time to time insured. This is a suit for the value of the work and materials in place and on the floors. The defence is a failure to complete the work according to the contract.

1. Besides the fact that the work was in progress after the date fixed by the contract for its completion, it also appears that by agreement between the parties the backs of a few of the pews were to be altered in some respects at the cost of the defendant. It does not appear whether the time for completing the work was extended by agreement or by acquiescence. Neither the extension of the time for the completion of the work, nor the agreed changes as to those pews, affected the contract in its other provisions. The contract in all other respects remained in full force. Plaintiff cannot simply because of this delay and these alterations abandon the contract and sue for the value of the work. 19 Pick. 275.

2. Some reliance for a recovery is also placed upon an alleged acceptance, and in support of this we are cited to *Lord v. Wheeler*, 1 Gray, 282. We do not regard the facts of that case analogous to this. There, when the repairs were substantially done, and before the fire, the defendant by his tenant entered into and occupied the house and so used and enjoyed the labor and material, which use and enjoyment it was held, were a severance of the contract, and an acceptance *pro tanto*. Here there is no pretense that the edifice was even used for any other purpose than that of construction, and that use is contemplated by the contract. The contract also determines by whom and how the acceptance shall be made. The duty to pass upon the work did not arise until completion. There is, therefore, nothing in the case upon which to base any claim upon the ground that the work or any part of it had been accepted.

3. Where a contractor undertakes to build a house

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upon the land of another, and the house before its completion is destroyed by fire without his fault, he is not thereby relieved from his obligation to fulfill the contract. The duty in such a case is to be distinguished from one imposed by law. The obligation to build is founded upon, and is his own voluntary contract, and its non-performance is not excused by inevitable accident. *Adams v. Nichols et al.*, 19 Pick. 275; *Tompkins v. Dudley*, 25 N. Y. 272; *School Dist. v. Dauchy*, 25 Conn. 530; *School Trustees v. Bennett*, 3 Dutcher, 515; *Dermott v. Jones*, 2 Wall. 1. In all of these cases the contract was to build a house entire and complete and it is apparent they are quite unlike the contract in question here. There are two lines of authorities which have a direct bearing upon the question in hand. In Addison on Contracts, volume 2, page 554 (Morgan's Ed.), it is said: "Where a man contracts to expend material and labor on buildings belonging to and in the occupation of the employer to be paid for on completion of the whole, and before completion the buildings are destroyed by accidental fire the contractor is excused from completing the work but is not entitled to any compensation for the work already done, which perished without any default of the employer." The contractor in *Appleby v. Meyers*, L. R. 2 C. P. 651, agreed to provide and erect certain machinery for a fixed sum and keep the same in repair for two years. The rule applied is as stated in the text of Addison. In *Brunby v. Smith*, 3 Ala. (N. S.) 123, the agreement was to complete the carpenter's work on a house of the employer for a specified sum to be paid when the work was completed, the material to be furnished by the employer. The house was destroyed by fire a few days before completion of the work, and it was held the carpenter could not recover for work done. The ruling is placed upon the ground that the contract was entire, and by its terms the labor was not to be paid for until the work was com-

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pleted. But in the same state it is held where the work is to be paid for in installments, then the mechanic may recover the installments due at the time of the destruction of the work. *Partridge v. Forsyth*, 29 Ala. 200.

On the other hand some of the courts of the states have expressly declined to follow the rule announced in *Bramby v. Smith*, and others apply rules in like cases inconsistent therewith. In *Hollis v. Chapman*, 36 Texas 11, the mechanic agreed to furnish the materials and do the carpenter's work on two brick buildings then in process of erection for a specified sum and to turn them over complete, with all possible dispatch. (The court said: "This agreement could not possibly have been an entire independent contract, for it was dependent on many circumstances, such as the erection of the walls to receive the carpenter's work, the plastering, glazing, painting, etc., and there was no stipulation in regard to the time of payment.") So in *Cleary v. Sohler*, 120 Mass. 210, where a workman had contracted to lath and plaster a building for a certain sum per yard, and he had lathed the building and put on one coat of plastering, when without his fault it was destroyed by fire, it was held he could recover for the work done. There was no express agreement as to the time of payment. *Cook et al. v. McCabe*, 53 Wis. 250, is not unlike the two cases last cited, save that the work was to be paid for in part when completed and the balance at a designated time thereafter. That case concedes the general rule to be that one who undertakes to build a house must do so, and cannot recover for work done in case the house is destroyed by fire before completion, but it also holds that the rule is only applicable when the contract is not subject to any conditions expressed or implied. See also *Rawson v. Clark*, 70 Ill., 656. In *Niblo v. Binsse*, Keyes, 476, the contractor agreed to furnish and put into a house then under construction, steam coils, etc., the work to be paid for as parts of the work were completed,

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another when the work was done and the residue when the work was tested and found sufficient. After the greater portion of the work had been done and several payments made, the building accidentally burned. Recovery was allowed for the labor and material according to the contract as far as the work had gone. The judgment in that case is not made to depend upon the fact that the work was to be paid for in installments, but it is placed upon the express ground that the owner was bound to have and keep the house in readiness to receive the work. Such a stipulation was not expressed in the contract, but it was held to be implied. The cases cited from the Supreme Courts of Texas and Wisconsin stand substantially upon the same ground.

Now in this case the fixtures were, it is true, to be put in place and completed to the satisfaction of the building committee, and to be paid for only when completed. But the contract is based upon the assumption, that the defendant would have its edifice erected and ready to receive the work. All this was a condition precedent to the performance of the contract by the plaintiff. The implied contract on the part of the defendant was to have and keep the building ready to receive these fixtures and to furnish room therein for them for such length of time as would reasonably be required to put them in place. The agreement to do all this is as much a part of the contract, as if expressed therein in terms. This the defendant failed to do. Besides this the house was in the possession, control, care and custody of defendant, and the plaintiff had nothing to do with its protection, further than to be without fault as to its own work. The contract was not, therefore, an absolute one to do the work at all hazards, but it was dependent upon the assumed and implied conditions before stated, conditions which the defendant was to perform and which it did not perform. According to the weight of the American authority such a contract is severable to the extent

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that the mechanic may recover for work done up to the time of the fire. In this case the recovery should include the fixtures on the floor as well as those in place. The judgment of the court of appeals is, therefore, affirmed. Norton, J., dissents. The other judges concur.

DOWLING V. GERARD B. ALLEN & Co., *Appellants*.

1. **Instruction: ASSUMPTION OF FACT.** The judgment in this case reversed, because of the assumption of a material fact in an instruction given for the plaintiff.
2. **Negligence: INEXPERIENCED YOUTH.** While less care and foresight are exacted of an inexperienced youth than of a man of mature years, yet if the former was aware of the danger to which he was exposed, any negligence on his part which contributed directly to his injury will defeat his recovery.
3. **Vice-Principal: FELLOW SERVANTS.** The rule announced in *Moore v. Ry.*, 85 Mo. 588, and *McDermott v. Ry.*, 87 Mo. 285, defining who is a vice-principal and what constitutes the relation of fellow servants, adhered to.
4. **Change of Venue: WHEN MUST BE GRANTED.** An application for a change of venue because of the prejudice of the inhabitants of the county, if sufficient in form and substance, must be granted. The facts alleged in it cannot be controverted by the opposing party.
5. — : **NOTICE.** The court refuses to disturb the judgment in this case because of alleged want of reasonable notice to the opposite party of the application for the change of venue.

Appeal from St. Louis Court of Appeals.

REVERSED.

Broadhead & Haussler and Alexander Martin for appellants.

[1] The testimony is not sufficient to support the

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verdict. [2] The instructions given for plaintiff were wrong; they left the question of negligence to the jury. Negligence is a question of law for the court and the latter must state some rule as to what constitutes negligence, and the province of the jury is to ascertain whether the facts of the case on trial bring it within the rule. *Goodwin v. Ry.*, 75 Mo. 74; *Yarnall v. Ry.*, 75 Mo. 583; *Wyatt v. Ry.*, 62 Mo. 411; *Turwater v. Ry.*, 42 Mo. 196. [3] The third instruction for plaintiff was wrong, because by it the jury was told that King was not the fellow servant of plaintiff, if plaintiff was told by Fisher, the foreman of the shop, to go with King and do whatever he directed. *Lee v. Iron Works*, 62 Mo. 567; *Marshall v. Schricker*, 63 Mo. 308; *Brothers v. Cartler*, 52 Mo. 372; *McGowan v. Ry.*, 61 Mo. 528; *Daubert v. Pickel*, 4 Mo. App. 371; *Hoke v. Ry.*, 11 Mo. App. 579; *Valley v. Ry.*, 85 Ill. 50; 53 Ill. 336. [4] The motion in arrest of judgment should have been sustained. [5] The plaintiff was not entitled to a change of venue, and the lower court erred in refusing to permit defendant to introduce evidence to show that the facts alleged in the petition for the change of venue were not true. Besides, it does not appear that reasonable notice of the application was given; in fact, there is no evidence that any notice was given, as required by Revised Statutes, section 3733.

Fisher & Rowell for respondent.

[1] The evidence is sufficient to support the verdict. [2] The first instruction given for plaintiff was in proper form. *Coombs v. Cordage Co.*, 102 Mass. 572; *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219; *Bell v. Ry.*, 72 Mo. 50. [3] The third instruction for plaintiff was designed to explain to the jury the relation between the plaintiff and the defendant's employe, named King, and properly declares the law. The question of negli-

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gence was rightly left to the jury. *Mauerman v. Siemerts*, 71 Mo. 101; *Norton v. Illner*, 56 Mo. 352; *Wyatt v. Ry.*, 55 Mo. 485; *Bell v. Ry.*, 72 Mo. 50. [4] There could be more than one *alter ego* in an establishment of the magnitude of that of defendant. *Hall v. Ry.*, 74 Mo. 298; *Blessing v. Ry.*, 77 Mo. 410; *McGowan v. Ry.*, 61 Mo. 528. [5] The lower court did not err in overruling the motion in arrest of judgment. [6] The change of venue was properly granted. The affidavit was conclusive on the question of the prejudice of the inhabitants of the city. *Corpenney v. Sedalia*, 57 Mo. 91; *Mix v. Kepner*, 81 Mo. 93. [7] Reasonable notice of the application is all that was required. *Reed v. State*, 11 Mo. 379; *State v. Floyd*, 18 Mo. 349; *Perry v. Roberts*, 17 Mo. 36; *Corpenney v. Sedalia*, 57 Mo. 88. [8] Voluntary appearance of the party after the change of venue waives any defect in the proceedings for change. *Powers v. Brawder, Adm'r*, 13 Mo. 154; *Montgomery v. Scott*, 32 Wis. 249; *Blackburn v. Sweet*, 38 Wis. 578; *Carpenter et al. v. Shepherdson*, 43 Wis. 406; *In re Shaffer's Estate*, 45 Wis. 614; *Burnham v. Halfield*, 5 Black. (Ind.) 21; *Owens v. Owens*, Hard. (Ky.) 154; *Russell v. Knowles*, 5 Miss. 90.

HENRY, C. J.—This cause was here, on appeal, at the October term, 1881, and the judgment of the court of appeals, reversing that of the circuit court, was affirmed. On a re-trial of the cause, plaintiff obtained a judgment for ten thousand dollars, from which this appeal is prosecuted. The case is reported in 74 Mo. 14, and we adopt the statement there made, as substantially correct, except that on a re-trial of the cause, defendant introduced evidence contradictory of material testimony adduced by the plaintiff. Plaintiff testified that King directed him to "go and stop off the engine." King testified that he had no recollection of giving plaintiff an order, or direction; that, "when the noon bell rang,

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work dropped ; the noon bell itself would be an order for stopping the engine ; plaintiff had started and stopped the engine before this, probably one hundred times ; the bell rang and he went to the engine, of course." Robert Cook testified, that when the noon bell rang, he was talking to King ; knew of no order to the plaintiff to shut off steam. Had seen the plaintiff shut off steam a number of times before.

The testimony on both sides was to the effect that there were other pass-ways than that taken by plaintiff to the place where he had to go to shut off steam. Neither plaintiff nor any other witness testified that he was directed by King to go the route that took him over the set screw.

Among other instructions the court, at plaintiff's instance, gave the following :

"The court instructs the jury that if they find from the evidence that the employe of the defendant, named King, had charge or management of that part of defendant's work embracing the construction of the turn-table, and the machinery used in such construction, and that the plaintiff who was injured was directed by the foreman, Fisher, to go with said King and do whatever he directed, then said King was not the fellow servant of said plaintiff, and the defendant is responsible for his acts, and if the jury find from the evidence that, under the circumstances of this case, it was negligence or recklessness for said King to direct the plaintiff to perform the work in the manner he did, when he received the injury, the defendant will be responsible therefor."

This clearly assumes that King not only directed the plaintiff to shut off the steam, but to do it in the manner in which he did it when he received the injury. It does not tell the jury that if * * * they found the fact to be, that King directed the plaintiff to shut off the steam, in the manner in which plaintiff did

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it, and also find that, under the circumstances of this case, it was negligence or recklessness so to direct plaintiff, the plaintiff was entitled to a verdict. And even in that form, unobjectionable, if there was evidence to support the hypothetical facts, it would have been error, for there is not a scintilla of testimony proving, or tending to prove, that King directed the plaintiff to take the route that led over the set screw.

The other instructions for plaintiff are objected to as submitting the question of negligence to the jury, generally, without any declaration of what fact constituted negligence; and also that they assumed that plaintiff was not of an age to be aware of the danger from the set screw and collar. As to the latter contention, we do not think that there is any such assumption as alleged.

By the second instruction the jury are told that "although they may find, from the evidence, that the set screw and collar attached to the shaft were visible, and the danger in passing over the same was apparent to a person of mature years, or one accustomed to the use of such machinery, yet if the jury further find that by reason of the youth and inexperience of plaintiff, he was not aware of the danger to himself from said set screw and collar, the fact that they were so visible or apparent will not defeat his right to recover in this case."

The obvious meaning of the instruction is, that the jury were to find as a fact, first, the age of plaintiff; and, second, that he was too young and inexperienced to be aware of the danger to which he was exposed. There is no assumption of either of these propositions. How old plaintiff was, and whether old enough to be aware of the danger to which he was exposed were submitted to the jury as questions of fact by the instruction. The first instruction declared that, "if the danger was not apparent to a party of the age and experience of plaintiff, and that he did not have sufficient, or reason-

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able notice of such danger, and without any negligence on his part, by reason of his youth, or inexperience, * * * he failed to appreciate the danger," etc. His age and intelligence were matters of enquiry—evidence was introduced in relation to both—and no jury of sensible men could have understood the court as declaring by that instruction that, by reason of defendant's youth and inexperience, he did not, or could not, appreciate the danger in passing over the shaft, but must have understood that these were questions submitted to them for their determination on the evidence.

The instructions for plaintiff were sufficiently specific in regard to what constitutes negligence of the character complained of, and which the testimony tended to prove. We think the fourth instruction objectionable. It declares that, "Although the jury may find, from the evidence, that the plaintiff was guilty of some negligence at the time of the injury, yet if they find that such negligence was slight or remote, and that the negligence of defendant was the direct cause of the injury to plaintiff, he will not be precluded from recovery by reason of such slight or remote negligence." Putting out of view the question of plaintiff's age and inexperience, and considering him as an adult, if guilty of any negligence contributing directly to produce the injury, whether slight or not, he could not recover. What, but for consequences which follow, might be esteemed slight negligence, sometimes directly occasions serious injury to the negligent party. The age and inexperience of the party may be taken into consideration in passing upon the question of negligence alleged against him. For instance, no negligence is imputable to a child, although its own carelessness may produce its injury—and less care and foresight are exacted of an inexperienced youth than of a man of mature years. If, in this case, the plaintiff was too young and in experi-

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enced to appreciate the danger to which he was exposed, then conduct on his part which would be negligence in one aware of the danger, might not be imputed as negligence in him. But if the jury should find that he was aware of the danger to which he was exposed, any negligence on his part which contributed directly to his injury will defeat his action. *Murray v. Ry.*, 33 Alb. Law Journal, No. 5, p. 92; *Shearman & Redf. on Neg.*, sec. 49; *Ry. v. Gladman*, 15 Wall. 401; *Ry. v. Stout*, 17 Wall. 657; *Boland v. Ry.*, 36 Mo. 484; *Cauley v. Ry.*, 98 Pa. St. 498. The doctrine of comparative negligence in these cases has no footing in this court, and the instruction in question has a strong leaning in that direction.

The correct rule is succinctly declared in *Boland v. Ry.*, 36 Mo. 484. No complaint is now made of this instruction, and we notice it because the judgment will be reversed and the cause remanded; and if this instruction should be given again it might be assigned as error on another appeal, and cause another reversal. The instructions, except as herein otherwise indicated, we think, fairly declared the law to the jury.

We are urged to re-consider the question passed upon when the cause was here before, as to the relation between King and plaintiff. We then held that they were not fellow-servants, and adhere to what was then announced on that subject, and refer to *Moore v. Railroad*, 85 Mo. 588, and *McDermott v. Railroad*, 87 Mo. 285. Plaintiff applied for a change of venue from the St. Louis circuit, and it was awarded to the circuit court of Louis county, and this is assigned as error. Section 3729, Revised Statutes, provides that: "A change of venue may be awarded * * * for the following causes * * * fourth, that the opposite party has an undue influence over the inhabitants of the county." This section was amended in 1881, by adding these words to those last quoted: "But in no case shall more than

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one change be granted to either party." This was the only change, and counsel for appellant err in stating that the word "all" was added to the amendment before the words "inhabitants of the county," so that it should read: "That the opposite party has an undue influence over *all* the inhabitants of the county." Section 3742 provides that the word "county," as used in this article, shall be construed to embrace the city of St. Louis, and changes of venue shall be awarded to and from the courts of said city as if it were a county."

Counsel also insist that the court erred in refusing to permit them to introduce evidence to show that the petition for change of venue was not true. Section 3733 is as follows: "If reasonable notice shall have been given to the adverse party, or his attorney of record, the court, or judge, as the case may be, shall consider the application, and, if it be sufficient, a change of venue shall be awarded to some county where the cause, or causes, complained of do not exist," etc. The only question to be determined by the court under that section, is the sufficiency of the application. The section does not require that the judge shall be satisfied of the truth of the allegations. If the petition is sufficient in form and substance, then the statute is peremptory, and the change of venue shall be awarded.

But it is insisted that reasonable notice of the application was not given to defendant. It appears from the record, that on the thirty-first of January, 1882, plaintiff filed his motion for a change of venue and notice of his application. February 1, 1882, he had leave to withdraw that motion and thereupon re-filed it, together with notice of the application, and on the third of February, 1882, the court awarded the change of venue. The fair inference is that the same motion was re-filed, and that a new notice was given February 1. We cannot say that two days notice is not reasonable, but here the first notice was given January 31, and in *Reed*

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v. State, 11 Mo. 380, the defendant filed an application for a change of venue, which was overruled five weeks thereafter, and on the day of trial he gave the prosecuting attorney written notice, and immediately renewed his former application, based on the same ground, and the court held that the filing of the first application, although overruled, was of itself notice. See also *Corpenny v. City of Sedalia*, 57 Mo. 88. If the application is sufficient, it being the duty of the court at once to award the change, it is difficult to perceive a reason for requiring any notice whatever of the application. It is only necessary because the statute requires it, and the trial court having passed upon the sufficiency of the notice, we are not inclined to review its action, unless there are peculiar circumstances in the case which demand it. The judgment is reversed and the cause remanded.

DAILEY, *Appellant*, v. THE SINGER MANUFACTURING
COMPANY *et al.*

Married Woman: CONTRACT. A married woman who purchases personal property with her own means and on her own credit, can, since the act of 1875 (R. S. sec. 3296) charge it by her note, secured by her deed of trust thereon, for the payment of the purchase price.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

R. W. Goode for appellant.

(1) Under the so-called chattel mortgage, the respondents had no right to take, carry away or sell the machine, without tendering appellant the money already

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paid by her, less 25 per cent. R. S. secs 2507, 2508. (2) The appellant, being a married woman, with no separate estate, could not legally bind herself by the contract, mortgage or note. *Horton v. Ransom*, 6 Mo. App. 19; *Nash v. Norment*, 5 Mo. App. 547; *Bauer v. Bauer*, 40 Mo. 61; *Chouteau v. Merry*, 3 Mo. App. 182; *Long v. Cockerill*, 55 Mo. 93; *King v. Mitlberger*, 50 Mo. 185; *Huff v. Price*, 50 Mo. 229; *Bank v. Taylor*, 62 Mo. 340; *Gage v. Gage*, 62 Mo. 412; *Lincoln v. Rowe*, 61 Mo. 574; *Kimm v. Weippert*, 46 Mo. 532; *Schaforth v. Ambs*, 46 Mo. 114; *Coats v. Robinson*, 10 Mo. 759; *Higgins v. Peltzer*, 49 Mo. 152; *Musick v. Dodson*, 76 Mo. 624.

Taylor & Pollard for respondents.

(1) The sewing machine was, under the evidence, the sole and separate property of plaintiff (R. S. sec. 3296), and she had the right to charge it, by a deed of trust for the payment of a note given for the purchase money. *McQuie v. Peay*, 58 Mo. 59; *State v. Berberich*, 9 Mo. App. 130; *Kimm v. Weippert*, 46 Mo. 535; *Root v. Shaffer*, 39 Iowa 375; Jones on Chattel Mortgages, sec. 32; *Brown's Appeal*, 68 Pa. St. 128; *Cheever v. Wilson*, 9 Wall. 119; *Demorest v. Winkoff*, 3 Johns. Ch. 144. (2) A mortgagee of personal property is, after the day of redemption is passed, regarded in law as the absolute owner and may dispose of the property in any manner he pleases. *Robeson v. Campbell*, 8 Mo. 365, 615; *Williams v. Rorer*, 7 Mo. 556; *Lacey v. Gibony*, 36 Mo. 122; *Bowens v. Benson*, 57 Mo. 26; *Heyland v. Badger*, 35 Cal. 404. (3) The trustee in a deed of trust is the agent of both debtor and creditor, and the plaintiff cannot recover of defendant for the acts of the trustee. *Goode v. Comfort*, 39 Mo. 313; *Carter v. Alshire*, 48 Mo. 300. (4) A mortgageor cannot maintain trover against the mortgagee, because the former has no title. *Highland v. Badger*, 35 Cal. 404; *Middleworth v. Sedgwick*, 10 Cal. 392; *Redman v. Gould*, 7 Blackford, 361; *Kemp v.*

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Thompson, 17 Ala. 9; *Stephenson v. Little*, 10 Mich. 433.
(5) The plaintiff really consented to the taking of the machine. Consent is a defence to a civil injury. *Cooley on Torts*, 163 and 439; *Caldwell v. Farrow*, 28 Ill. 438.

NORTON, J.—This action was brought to recover five thousand dollars damages alleged to have been sustained by plaintiff, by the unlawful entry of defendants into her dwelling house, and taking therefrom a sewing machine and converting the same to their own use. Defendants answered and set up substantially the following state of facts: That in 1878 defendant company sold and delivered to plaintiff the sewing machine in question, for which she paid five dollars, and gave her note for fifty dollars, payable in monthly installments of five dollars; that to secure this note she executed a deed of trust, making defendant, Snitzer, one of the trustees on the machine so sold to her, conditioned that if said debt or any part thereof was not paid when due, the whole should become due, and the trustees might proceed to sell the machine for its payment; that after the execution of said deed of trust plaintiff made several payments amounting in the aggregate to twenty-six dollars, but made default in the payment of twenty-four dollars, and being in default, the trustees, through an agent, peaceably demanded of plaintiff the possession of the machine in order to execute the trust; that plaintiff consented to the taking of the machine by the agent, and the trustees sold it as provided in the deed of trust, and that it is said act in taking and selling of the machine of which plaintiff complains. On the trial judgment was rendered for defendant, which was affirmed on plaintiff's appeal to the St. Louis court of appeals, from which judgment of affirmance plaintiff has appealed to this court.

Plaintiff, who testified in her own behalf, stated that the machine was her sole and separate property,

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paid by her, less 25 per cent. R. S. secs 2507, 2508. (2) The appellant, being a married woman, with no separate estate, could not legally bind herself by the contract, mortgage or note. *Horton v. Ransom*, 6 Mo. App. 19; *Nash v. Norment*, 5 Mo. App. 547; *Bauer v. Bauer*, 40 Mo. 61; *Chouteau v. Merry*, 3 Mo. App. 182; *Long v. Cockerill*, 55 Mo. 93; *King v. Mitulberger*, 50 Mo. 185; *Huff v. Price*, 50 Mo. 229; *Bank v. Taylor*, 62 Mo. 340; *Gage v. Gage*, 62 Mo. 412; *Lincoln v. Rowe*, 61 Mo. 574; *Kimm v. Weippert*, 46 Mo. 532; *Schaforth v. Ambs*, 46 Mo. 114; *Coats v. Robinson*, 10 Mo. 759; *Higgins v. Peltzer*, 49 Mo. 152; *Musick v. Dodson*, 76 Mo. 624.

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(1) The sewing machine was, under the evidence, the sole and separate property of plaintiff (R. S. sec. 3296), and she had the right to charge it, by a deed of trust for the payment of a note given for the purchase money. *McQuie v. Peay*, 58 Mo. 59; *State v. Berberich*, 9 Mo. App. 130; *Kimm v. Weippert*, 46 Mo. 535; *Root v. Shaffer*, 39 Iowa 375; *Jones on Chattel Mortgages*, sec. 32; *Brown's Appeal*, 68 Pa. St. 128; *Cheever v. Wilson*, 9 Wall. 119; *Demorest v. Wynnokoff*, 3 Johns. Ch. 144. (2) A mortgagee of personal property is, after the day of redemption is passed, regarded in law as the absolute owner and may dispose of the property in any manner he pleases. *Robeson v. Campbell*, 8 Mo. 365, 615; *Williams v. Rorer*, 7 Mo. 556; *Lacey v. Gibony*, 36 Mo. 122; *Bowens v. Benson*, 57 Mo. 26; *Heyland v. Badger*, 35 Cal. 404. (3) The trustee in a deed of trust is the agent of both debtor and creditor, and the plaintiff cannot recover of defendant for the acts of the trustee. *Goode v. Comfort*, 39 Mo. 313; *Carter v. Alshire*, 48 Mo. 300. (4) A mortgageor cannot maintain trover against the mortgagee, because the former has no title. *Highland v. Badger*, 35 Cal. 404; *Middleworth v. Sedgwick*, 10 Cal. 392; *Redman v. Gould*, 7 Blackford, 361; *Kemp v.*

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Thompson, 17 Ala. 9; *Stephenson v. Little*, 10 Mich. 433.
(5) The plaintiff really consented to the taking of the machine. Consent is a defence to a civil injury. *Cooley on Torts*, 163 and 439; *Caldwell v. Farrow*, 28 Ill. 438.

NORTON, J.—This action was brought to recover five thousand dollars damages alleged to have been sustained by plaintiff, by the unlawful entry of defendants into her dwelling house, and taking therefrom a sewing machine and converting the same to their own use. Defendants answered and set up substantially the following state of facts: That in 1878 defendant company sold and delivered to plaintiff the sewing machine in question, for which she paid five dollars, and gave her note for fifty dollars, payable in monthly installments of five dollars; that to secure this note she executed a deed of trust, making defendant, Snitzer, one of the trustees on the machine so sold to her, conditioned that if said debt or any part thereof was not paid when due, the whole should become due, and the trustees might proceed to sell the machine for its payment; that after the execution of said deed of trust plaintiff made several payments amounting in the aggregate to twenty-six dollars, but made default in the payment of twenty-four dollars, and being in default, the trustees, through an agent, peaceably demanded of plaintiff the possession of the machine in order to execute the trust; that plaintiff consented to the taking of the machine by the agent, and the trustees sold it as provided in the deed of trust, and that it is said act in taking and selling of the machine of which plaintiff complains. On the trial judgment was rendered for defendant, which was affirmed on plaintiff's appeal to the St. Louis court of appeals, from which judgment of affirmance plaintiff has appealed to this court.

Plaintiff, who testified in her own behalf, stated that the machine was her sole and separate property,

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that her husband had nothing to do with the transaction, that she bought it with her own means on her own credit. The evidence on behalf of defendant tended to establish the state of facts set up in the answer.

The material question raised on plaintiff's appeal is presented by the following instruction given by the court, viz :

"The court instructs the jury, that if they believe from the evidence that the note and deed of trust read in evidence were signed by the plaintiff and delivered to the Singer Manufacturing Company, as a part of the consideration for the sewing machine mentioned in the pleadings and testimony, and that said machine was purchased by her with her own means and on her own credit, then said deed of trust when delivered by her became a valid security for the payment of said note, and that when plaintiff made default in the payment of said note, the trustees in the deed of trust had a perfect right to obtain possession of said machine, and the plaintiff could not maintain an action against said trustees, nor the holder of said note on account of said trustees obtaining peaceable possession of said machine, for the purpose of selling it as provided in the deed of trust, and if they find such facts be true, the verdict should be for the defendants." •

It is insisted by counsel that this instruction, as well as the admission of the note and deed of trust in evidence was erroneous, because plaintiff, at the time she signed the note and deed was a married woman, and, therefore, incapable of making a binding contract. It has been held by this court that a married woman, the owner of real property as her sole and separate estate, may charge it in equity by the execution of a note for the payment of money, and that in equity a note made by a wife payable to the husband is, in the hands of a third party, capable of enforcement as a charge against her separate estate. *Morrison v. Thistle*, 67 Mo. 596; *McQuie v. Peay*, 58 Mo. 59; *Kimm v. Weippert*, 46 Mo.

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535. It would seem to follow from the above that since the act of 1875, section 3296 Revised Statutes, that a married woman, as to her sole and separate property can act as a *femme sole*, has the *jus disponendi* and can bind herself either by any contract she may make for the sale of or by any contract for the purchase with her separate means of personal property as her sole and separate property. The objection made that plaintiff is not bound either by the note or deed of trust, may well answered by the case of *Bower's Appeal*, 68 Pa. St. 128, in which it is said: "Her power to purchase gives her a right to contract for the payment of the consideration money so far as to charge the property with such incumbrance as may be agreed upon to secure its payment. A judgment given for this purpose is not void on the ground of coverture, and the application to deprive the creditor of his security for his money was properly denied. If a court permitted her to retain the property and at the same time refused payment of the consideration money it would no longer deserve the name of a place where justice is judicially administered. It is not proposed to charge the woman personally with the judgment, nor are we prepared to say that her other property is chargeable with the debt."

Sections 2507 and 2508 Revised Statutes, cited by counsel, have no application to a case like this, where there has been an absolute sale, but they apply to such sales as are made on the condition that the title is to remain in the vendor, till the purchase price is fully paid. Nor is there anything in the point made, that the company by accepting lesser sums or payments than were called for in the deed of trust, waived its right to take the machine under the deed of trust and sell it because of default in the payment of what was due. *Ford v. Beard*, 31 Mo. 461; *Wiley v. Hight*, 39 Mo. 130.

The judgment of the court of appeals is hereby affirmed. All concur.

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PETTY V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*.

1. **Railroad: ROAD CROSSING: RINGING BELL, ETC.** A railroad is guilty of negligence in not ringing the bell, or sounding the whistle of its locomotive at a distance of eighty rods from a road crossing.
2. ———: ———: ———: **CONTRIBUTORY NEGLIGENCE.** Although one is injured by reason of the failure of the servants of the railroad to comply with the statutory requirement as to ringing the bell and sounding the whistle of its locomotive, he cannot recover if his own negligence directly contributed to the injury.
3. **Contributory Negligence, When a Question for the Jury.** When the undisputed facts relied on to establish contributory negligence are such as may, in the judgment of sensible men, lead to different conclusions thereon, the question should be submitted to the jury.
4. **Railroad Crossing: TRAVELER.** Negligence is not imputable to one for attempting to drive over a railroad crossing without stopping and looking for a train, when by doing so he could not have seen the train which occasioned the injury.
5. ———: **QUESTION FOR THE JURY.** Whether or not the deceased, by stopping and listening, could have heard the train, was, under the circumstances of this case, a question for the jury.
6. ———. One approaching a railroad crossing has a right to presume that the railroad will obey the law in notifying him of the approach of its train by ringing its bell or sounding its whistle, when within a quarter of a mile of the crossing.
7. **Contributory Negligence.** Contributory negligence is a matter of defence, and need not be alleged or proved by the plaintiff.

Appeal from Clinton Circuit Court.—HON. GEORGE W. DUNN, Judge.

AFFIRMED.

Smith & Krauthoff for appellant.

(1) The uncontradicted evidence shows that if de-

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ceased had looked (certainly if he had done so when within fifty yards, or less, of the track), he could have seen the train for a distance which increased from fifty yards to forty-two rods, as he approached the track, and that if he had stopped and listened he could have heard the train at least a half a mile distant. Under these circumstances the plaintiff could not recover. *Hixson v. Ry.*, 80 Mo. 335; *Allyn v. Ry.*, 105 Mass. 77; *Railroad Co. v. Miller*, 25 Mich. 274. (2) The proof of absence of contributory negligence was an essential element of plaintiff's case. *Adams v. Carliss*, 21 Pick. 146; *Carsley v. White*, 21 Pick. 254; *Lucas v. Ry.*, 6 Gray, 64; 8 Allen, 137; 14 Allen, 429; 100 Mass. 208; 133 Mass. 507; *Parks v. O'Brien*, 23 Conn. 339; *Merrill v. Hampden*, 26 Me. 234; *Hyde v. Jamaica*, 27 Vt. 443; *Railroad Co. v. Gregory*, 58 Ill. 272; *Railway Co. v. Brannagan*, 75 Ind. 490; *Hubbard v. Mason City*, 60 Ia. 400; *Vicksburg v. Hennessey*, 54 Miss. 391; *Owen v. Ry.*, 88 N. C. 502; *Moore v. Shreveport*, 3 La. An. 645; *Walsh v. Ry.*, 10 Ore. —; *Bruhan v. May*, 17 Ga. 136; 4 McLean, 333; 2 Woodb. & M. 345; *Railroad v. Van Sleinbur*, 17 Mich. 99; *Harlow v. Humonston*, 6 Cow. 189; 19 Wend. 399; 6 Hill, 592; Abbot's Trial Evid. 596; 1 Best on Evid., sec. 266. (3) All the instructions given for plaintiff totally ignore the element of contributory negligence, and are defective in that regard. *Gilson v. Ry.*, 76 Mo. 282.

Thomas E. Turney also for appellant.

(1) The only negligence on the part of defendant's servants alleged, or attempted to be proved, was their failure to give the signals when eighty rods distant from the crossing. Although this is negligence it is not such negligence as will relieve the injured party from the consequences of his own contributory negligence. *Harlan v. Ry.*, 64 Mo. 480; *Fletcher v. Ry.*, 64 Mo. 484; *Zim-*

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merman v. Ry., 71 Mo. 476; *Henze v. Ry.*, 71 Mo. 636; *Park v. Ry.*, 72 Mo. 169; *Kelley v. Ry.*, 75 Mo. 138; *Lenix v. Ry.*, 76 Mo. 86. (2) The deceased was guilty of such contributory negligence, in failing to look or listen before attempting to make the crossing, as to preclude plaintiff's recovery. *Harlan v. Ry.*, 64 Mo. 483; *Ry. v. McDamerill*, 87 Ill. 450; *Week v. Ry.*, 38 Ohio St. 632; *Tully v. Ry.*, 134 Mass. 499.

W. H. Haynes for respondent.

(1) The evidence on part of plaintiff was sufficient to warrant the submission of the case to the jury. (2) The statutory requirements of blowing the whistle and ringing the bell not being complied with, the deceased had the right to rely on the presumption that the defendant was obeying the law, and that, therefore, no train was within a quarter of a mile of the crossing at the time of the accident. Cooley on Torts, 664-5; *Johnson v. Ry.*, 77 Mo. 546. (3) The burden was not on this plaintiff to show the absence of contributory negligence on part of deceased. 19 Amer. Law Review (No. 5) 823.

NORTON, J.—This suit was instituted by plaintiff to recover damages for the killing of her husband on a public road, by reason of the negligence of defendant in failing to ring its bell or sound a whistle at the distance of eighty rods from said crossing. The answer was a general denial, and on the trial plaintiff had judgment, from which defendant has appealed, and assigned as the chief ground of error the action of the court in refusing to instruct the jury that, under the evidence, plaintiff could not recover.

In order to a fair consideration of the question pre-

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sented, we give all the evidence offered in the case, which is as follows :

The plaintiff, to sustain the issues on her part, offered evidence as follows :

Susan Petty testified as follows : "I am the plaintiff in this cause. My husband's name was John J. Petty ; he died September 13, 1879 ; he was at home the morning of that day, and was brought home dead that night ; he went to mill that day with his wagon and team ; several persons came with his body to our home ; he was my husband at the time he was killed."

Mr. Hathaway, being introduced on the part of plaintiff, testified as follows : "I lived about eight miles from Stewartsville, in Clinton county. I knew deceased when I saw him ; saw him shortly after he was killed ; his body was near defendant's railroad track on the thirteenth of September, 1879 ; he was lying about thirty feet from the crossing and about four feet from the track, and was entirely dead ; the top part of his head was mashed, and part of his nose was taken off ; the crossing was a public road crossing across the railroad track. Part of his wagon was on each side of the railroad track. The mules which were to the wheels of the wagon were killed. This was about eight o'clock, P. M. I saw no train at that time, but shortly before saw train on defendant's railroad pass going west ; when it passed the crossing I was about one-fourth of a mile south of the track, and about one-half mile east of the crossing ; I heard the train whistle twice ; did not hear it oftener ; I could not tell how far the train was from the crossing when it whistled ; it sounded like it was right close to the crossing, but could not say definitely how far away. I did not hear the bell ring." Cross-examined : "I was not acquainted with deceased, but knew him when I saw him. He lived about half a mile from the crossing ; I am acquainted with the crossing ; I think there was a board there erected by the railroad company,

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but am not positive whether it was there at that time or not. The night was an ordinarily still night. I was one quarter of a mile south of the track, and one-half mile east of the crossing at the time of the accident. I heard the train plainly; I heard the whistle only twice. I think deceased was in the habit of crossing the railroad at that place, hauling hay, etc. On the east side of the crossing is quite a high bank, and coming from the east a person cannot see the road until they get close to it. I know where the ringing post on the east side of the crossing is; I measured the distance from it to the crossing; it is forty-two rods and four feet east of crossing. I was traveling west when I heard the train. I was on a road running parallel with the railroad and a quarter of a mile south of it."

H. B. Scoville, introduced on part of plaintiff, testified as follows. "I live in Clinton county, and was acquainted with the deceased. On the thirteenth of September, 1879, I had been south of Stewartsville, and was on my way home; when I got within two hundred yards of the crossing on the east, and about seventy-five yards south of railroad track, the train going west passed me; when it came opposite the ringing post I heard three strokes of the bell, and as the rear car passed out of sight through the cut in the track, I heard two sharp whistles, and immediately thereafter a sound as if the train had struck something; I then heard the train backing. When I got to the crossing I saw something lying near the track and some men with it. I jumped over the fence and asked what was the matter; the train men told me they had run into a wagon and team. I saw Petty lying there dead. When they rang the bell they were at the ringing post; they whistled afterwards. I have measured the ground from the crossing to a post eighty rods distant east; they did not ring the bell at that distance; no bell rang from that point to the

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crossing, except three strokes at ringing post; when the whistle sounded the engine could not have been more than sixty yards east of the crossing; in but a moment after, I heard the collision. The nearest point west of the crossing where they can see a train in crossing, is two hundred yards; a man at this point could not reach the crossing before the train came; it is about two hundred yards from the crossing to the rise in the ground from which the train can be seen; there is a cut in the railroad just east of the crossing that would obscure a train from a man in the flat for about two hundred yards. I measured the distance from the crossing to the ringing post with a tape line; it is just forty-two rods and four feet east of the crossing. The accident occurred at a public crossing in this county. The train was a passenger train going west, and was due at Stewartsville at eight o'clock, P. M.; it was about on time; there was a headlight on the train burning brightly. The road deceased was traveling before reaching the crossing runs parallel with the railroad track for about one-fourth of a mile; at the west end it is about one-eighth of a mile distant from the track, and gradually nears the track until it turns abruptly south to the crossing; at this point it is about fifty feet distant from the track; at that point the headlight could not be seen more than fifty yards off, the railroad just east of the crossing running through a cut, and a hill or rise in the ground intervenes; this cut is forty rods long and ten or twelve feet deep; a man in the road would be some lower than the railroad track. There is a depression or flat in the road by which deceased approached about one hundred yards wide; just before you get to the point at which the road turns south; the road then inclines up to the crossing; at a point on the road, about twenty-five feet south of the track, you could see the headlight a distance of sixty yards; at a point ten or fifteen feet

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distant you could see it seventy-five yards, and when on the track you could see it about to the ringing post. Before one gets to the depression in the road he could see the headlight about one-fourth of a mile down the track, east of the crossing. There is nothing between this point and a grove half a mile off, to obstruct the view; for very nearly a half a mile, before entering the cut, the headlight could be seen by one on the road and west of the depression or flat. The night was a calm, pleasant night; the train could be heard distinctly half a mile off; I must have heard it a mile off; I was on foot. Petty was traveling with a wagon on which was a hay frame, with two mules at the wheel and two horses in the lead. There was a board at the crossing erected by the company, on the north side of the railroad; it is on two posts, about ten or twelve feet from the ground—is about sixteen feet long and about sixteen inches wide, white ground and large black letters on it, as follows: 'Railroad Crossing, look out for the cars.' Petty, I know, had been living there since the spring before, not quite three-fourths of a mile away from the crossing; have seen him cross there before. If he had stopped his team and listened he would have heard the train in time to avoid the accident. The train men said they must hurry up as they were a little behind time, or something worse would happen. Petty was about thirty years old. I think his hearing was good, as was also his eye-sight."

W. B. Hemple, introduced on the part of plaintiff, testified as follows: "I knew Petty, the deceased, for three or four years; he lived about three-fourths of a mile from me during that time; he was a good driver, or rather a first-class teamster; he was a man of ordinary care and prudence; he lived not quite three-fourths of a mile from the crossing and used it a good deal; he was well-acquainted with the crossing and with

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railroads in every respect, as he told me he was raised near them ; the crossing had a board over it with letters, 'look out for the cars.' The night of the accident was a quiet one—some wind blowing. Deceased was about thirty or thirty-five years old, and his hearing and eyesight were both good so far as I know. The wind was blowing quite a gale from the west, and the train was going west."

This was all the evidence on part of plaintiff.

The defendant then offered Joseph Conant, who testified as follows: "I am a locomotive engineer in the employ of the defendant; was in charge of the locomotive when the accident sued for happened. I whistled at the ringing post three times and the fireman rang the bell, but whether he continued to ring until the crossing was reached, I don't remember. The accident occurred about eight o'clock, P. M.; we were about three minutes late, and were running at the rate of twenty-five miles an hour, which is the schedule time between Easton and Stewartville, where the accident occurred; the headlight was burning brightly at the time. When about seventy-five or eighty feet from the crossing I first saw the deceased, he was about fifteen feet from the track, and his horses were in a trot approaching the crossing. I did everything in my power to save him; I shut off steam, reversed the engine and applied the air-brakes. The night was tolerably still; the noise of the train could be heard half a mile easily. I whistled three times in succession; a whistle can be heard a mile. The team of deceased was trotting along at a lively gait, not running, but trotting fast, when I saw them; they did not stop until they were struck; the engine was seventy-five or eighty feet from the team when I first saw it."

Henry B. Iba, introduced on part of defendant, testified as follows: "I am a boot and shoe maker, and postmaster at Easton, Missouri. I am acquainted with

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the crossing at which deceased was killed ; three weeks ago I was at the crossing at a point ten or fifteen feet from the track, and on the north side of track ; at that point a train could be seen from sixty to eighty rods east of the crossing, some distance beyond the ringing post. The eight o'clock, p. m., train came from the east while I was there, and I tested it in that way. The evening I was there was a pleasant one, but the wind was blowing some from the west ; I could hear the noise of the train when approaching at least two miles ; I could hear it distinctly when one mile away ; I could see the headlight some distance beyond the ringing post ; was at crossing at time stated at defendant's request ; Lithgow, attorney for defendant, got me to go ; was there for the purpose of looking and listening for the eight o'clock, p. m., train. The bell and whistle could be heard eighty rods. There is a depression or flat in the traveled road about one hundred yards wide ; it widens where the road turns south to the crossing ; from that point it widens to the crossing ; it is only while in this depression that a train cannot be seen by one in the road."

Mr. Miller, introduced by defendant, testified as follows : "I keep a hotel in Easton. I know the crossing at which the accident occurred. I was there about two weeks ago, at defendant's request ; I got there about ten or twenty minutes before the eight o'clock, p. m., train coming west ; I was sitting in my spring wagon twenty or twenty-five feet north of crossing when the train approached from the east ; a little wind was blowing from the west. I heard the train when it was two or three miles distant ; I mean the rumble of the train ; I know it was that distance from the time it was coming, and the whistle for the crossings. While I was in the depression in the road I could see no train. When the train whistled I started my team and drove across the crossing ; got two or three times the length of my team south of the track when the train reached the crossing ;

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it was running very fast, can't say how fast; if train had whistled when one-fourth of a mile away I would have had more time to cross; it whistled at the ringing post; when a man is ten or fifteen feet from the crossing on the north side of the track, he can see the headlight one hundred and twenty yards east of the crossing, but when back of that he can't see anything."

Jesse Ren, introduced by defendant, testified as follows: "I know the crossing at which deceased was killed; was there seven or eight days ago; went at defendant's request; I went alone; while I was there the eight o'clock, P. M., passenger train came from the east; it came very fast, being behind time; I stood about six feet from the track on the north side; from this point I could see the headlight quite a distance east of the ringing post; I heard the train when it was a mile and a half distant distinctly; at the corner of the fence where the road turns south to the crossing the train can't be seen by a man standing on the third plank of the fence more than seventy feet from the crossing; I ran to this point after the train whistled, and tested it in that way."

The evidence above detailed establishes the fact beyond question that defendant disregarded the obligations imposed by law, in not ringing its bell or sounding the whistle of its locomotive in approaching the road crossing at the distance of eighty rods therefrom, and in this respect it was guilty of negligence, as has been repeatedly held by this court. But notwithstanding such negligence on defendant's part, it has been repeatedly held that if the negligence of plaintiff contributed directly to the injury complained of, he could not recover. It is insisted by counsel that under the facts in evidence the question of contributory negligence was one of law, and that the court erred in submitting it to the jury, and we are asked to reverse the judgment on this ground. Where the undisputed facts relied upon to establish

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contributory negligence are such "as may in the judgment of sensible men lead to very different conclusions, as to whether they establish contributory negligence or want of care, the jury is the tribunal to determine the question." *Norton v. Illner*, 56 Mo. 351; *Mauerman v. Siemerts*, 71 Mo. 101. Testing the action of the trial court by the rule above indicated, we must hold it to be rightful. The deceased on the night of the accident was driving four horses to a wagon with a hay frame on it. The public road he was traveling runs nearly parallel to the railroad for about one-fourth of a mile. At its west end it is about two hundred yards from the railroad and gradually approaches the same till within fifty feet, when it abruptly turns south, across the railroad track. The deceased was on the road west of the crossing, traveling east, and defendant's train was east of the crossing, traveling west. East of the road crossing there is a cut in the railroad track forty rods long and ten or twelve feet deep. The evidence tends to show that, at a point on the highway two hundred yards from the railroad, a train could have been seen on the railroad for the distance of half a mile. After leaving this point until the point in the highway turning abruptly south, about fifty feet from the crossing, is reached, a train could not be seen on the track, in consequence of a depression in the highway and the cut in the railroad. One witness testifies that at the point where the road turns south it is fifty feet from the railroad, and from there the headlight could not be seen more than fifty yards off; at a point on the road twenty-five feet, the headlight could be seen sixty yards; at ten or fifteen feet it could be seen seventy-five yards; and when on the track you could see it to the ringing post. One of defendant's witnesses testified that when ten or fifteen feet from the track the headlight could be seen one hundred and twenty yards east of the crossing.

No one witnessed the accident except the engineer,

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who testified "that it occurred about eight o'clock, p. m.; we were about three minutes late, running twenty-five miles an hour. * * * When about seventy-five or eighty feet from the crossing, I first saw the deceased; he was about fifteen feet from the track, and his horses were in a trot approaching the crossing; I whistled at the ringing post three times, and the fireman rang the bell, but whether he continued to ring until the crossing was reached, I don't remember." Conceding that the evidence establishes the fact that deceased, when at the distance of two hundred yards from the crossing, could have seen, if he had looked, along the track of defendant's road for half a mile east of the crossing, still if by looking he could not see the train in question, negligence in not looking is not imputable to him, and the other evidence in the case conclusively shows that had he stopped and looked for the train in question he could not have seen it. *Henry v. Railroad*, 71 Mo. 636, at page 640. The evidence shows that the train was running twenty-five miles an hour, or one mile in about two minutes and a half, and that deceased was driving a four horse team, presumably at the rate of three or four miles an hour, or at the rate of a mile in fifteen or twenty minutes, and that both the team and the train reached the crossing at the same time. At the respective rates of speed the train and team were traveling the train, if only a half a mile off, would have reached the crossing before it could have been possible for the team to have reached it. The conclusion is, therefore, inevitable that the train must have been more than half a mile east of the crossing when defendant was on the highway two hundred yards from it, and he could not, therefore, have seen it had he looked.

But it is contended that he could have heard it by stopping and listening. Under the evidence, we think this was a question for the jury. Three witnesses testified, one that he was, on the night of the accident, east

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of the crossing, a half a mile east of the crossing, and a fourth of a mile south of the railroad, says he heard the train plainly; another witness also testified that he was traveling on a road east of the crossing, and seventy-five yards south of the track, that the train could be heard distinctly half a mile, and thinks he heard it one mile; that it was a pleasant calm night. Two witnesses testified that, two or three weeks before the trial, at defendant's request, they went to the crossing for the purpose of looking and listening for the train, and that they heard it for more than a mile, one of them saying a little wind was blowing from the west. Another witness testified that the night of the accident the wind was blowing quite a gale from the west, the train was east of the crossing going west, and deceased was west of the crossing going east. This evidence was properly submitted to the jury for their determination as to whether the deceased, in the locality he was, with the wind blowing from the west as testified to, with a cut of forty rods in length and ten or twelve feet deep in the railroad, could have heard the train.

But assuming that he could, at the distance of two hundred yards west of the crossing, have heard the rumbling noise of a train, and that in fact he did hear it, it does not follow that he was guilty of negligence in proceeding on his way, and for these reasons: The rumbling of the train would simply have imparted to him the knowledge of the fact that a train was running somewhere on the track, not whether it was approaching or going away from the crossing. But conceding that he heard the noise of the train, and that as a prudent man he was bound to know that it was approaching, still it would not be, as a matter of law, negligence for him to proceed on his way, inasmuch as, under such circumstances as are disclosed by the evidence in this case, the deceased might well have concluded that the approaching train was more than eighty rods from

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the crossing, and that it was safe for him to proceed on his way, relying upon the presumption that the defendant would not disobey the law, in failing to notify him of its approach by ringing its bell or sounding its whistle when it came within a quarter of a mile of the crossing, to which notice he was by law entitled, and which it was the duty of defendant to give. *Johnson v. Railroad*, 77 Mo. 546. The whistle was neither sounded nor the bell rung till the train was within forty-two rods of the crossing, and when the bell was rung or whistle sounded at that distance, the train could not, according to the evidence, pass by deceased from the point where he turned south with his team. So that when he heard the bell rung, or the whistle sounded, as he must have done, he had a right to believe that it was sounded at the distance of eighty rods instead of forty rods, and might, as a prudent man, have acted on the belief that he could pass with his team a distance of fifty feet over the crossing, before the train run eighty rods, or the distance of one thousand and thirty-two feet to reach the crossing. Indeed, the evidence of one of defendant's witnesses, who was requested to go to the crossing two weeks before the trial to test what could be seen, heard and done, and who was in a spring wagon, testified that he was twenty or twenty-five feet north of the crossing when the train approached, sitting in his spring wagon; when the train whistled at the ringing post, he started his team, drove over the crossing, and got two or three lengths of his team south of the track when the train reached the crossing.

We have been cited to a number of cases where it has been held, that under the facts in evidence, the court erred in submitting the question of contributory negligence to the jury, of which the case of *Fletcher v. Railroad*, 64 Mo. 484, is a representative. In that case the plaintiff testified that "if he had looked back he could have seen the train in time to have avoided the accident;

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that he neither looked nor listened for it; that he did not think of it." In nearly, if not all the cases to which we have been cited, these witnesses of the transaction who gave affirmative evidence that the plaintiff neither looked nor listened, when by looking and listening, he could beyond question have seen and heard the train. The case before us is more nearly allied to that of *Buesching v. St. Louis Gas Light Company*, 73 Mo. 219, where it is said that: "The presumption of due care always obtains in favor of plaintiff in an action to recover damages for an injury sustained by him, through the alleged negligence of another." It is very analogous to the case of *Schum v. Pennsylvania Railroad Company*, 107 Pa. St. 8, where it is said that in an action against a railroad company for running over and killing a person at a highway crossing, where there is no witness of the actual occurrence, the burden is not on the plaintiff to disprove negligence on the part of the deceased. The presumption is that he stopped, looked, and listened before attempting to cross, as the law required him to do. A person driving along the highway was killed by a train moving at great speed, and which gave no signal of its approach. The road crossed the track at an acute angle. The view of the track from the road, in the direction from which the train came, was obstructed by trees and bushes until within about ten yards of the track, when a clear view of the track could be had for about fifty yards. In an action against the railroad company to recover damages, the above facts were proved, but no witness of the accident was produced. A compulsory non-suit was awarded upon the ground that the deceased must have been guilty of contributory negligence, and this the court subsequently refused to take off; held that this was error, and that the question whether the deceased had been guilty of contributory negligence was not within the province of the court to decide. In the argument before us the point was made,

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and earnestly and ingeniously pressed upon our attention, that as a part of plaintiff's case it should have been averred in the petition, and proved by her on the trial, that deceased was without fault, and not guilty of contributory negligence. It is enough to say of it, that in the case of *Thompson v. Railroad*, 51 Mo. 190, the identical point now presented was made, and the attention of the court, in the briefs of counsel, was called to nearly all the cases which were alluded to in the argument before us, and after full consideration, the doctrine announced by Shearman & Redfield on Negligence was approved, the court holding that contributory negligence was a matter of defence to be proved by the party relying upon it. The doctrine there announced was reiterated in the subsequent case of *Loyd v. Railroad*, 53 Mo. 509, and has since been steadily adhered to, and from which we see no good reason to depart. The case in hand affords another example of the evil results flowing from the disobedience of railroads, in disregarding a statute enacted in the interest of humanity, and for the protection not only of the lives and property of those traveling on trains, but of the citizen and traveler on the highway as well. Its observance is a reasonable requirement, and for its non-observance railroad companies should be held to strict accountability. Where it is not observed and injury results, in an action to recover damages therefor, a clear case of contributory negligence must be established before the courts, as a matter of law, exempt them from liability on that ground.

The questions of facts involved were fairly submitted to the jury by the instructions given, and perceiving no error in the record, the judgment is affirmed. All concur, except Judges Henry and Sherwood, who dissent.

Watkins v. Donnelly.

WATKINS V. DONNELLY *et al.*, *Executors, Appellants.*

1. **Practice in Probate Court : ADMINISTRATION.** While formal pleadings are not required in probate courts, accounts and statements presented there for allowance should be sufficiently specific to apprise those in charge of estates of the facts involved, so that they may be able to protect the interests intrusted to their care and prevent the allowance of unjust demands.
2. **Pleading : PRACTICE : ADMINISTRATION.** The following claim : "To services rendered from July, 1869, to February, 1872, \$2,500," presented against an estate and allowed in the probate court, should, upon motion of the executor in the circuit court upon his appeal, be made more specific and definite.
3. **Administration : EVIDENCE.** Failure to make, keep and present an account to a person for \$2,500 for services claimed to have been rendered him during two and a half years affords some evidence adverse to such claim when presented for allowance against his estate.

Appeal from Jackson Circuit Court.—HON. SILAS H. WOODSON, Judge.

REVERSED.

Jas. F. Mister for appellants.

O. H. Dean and *W. J. Ward* for respondent.

SHERWOOD, J.—In the probate court of Jackson county a claim was presented against the estate of which the above named executors had charge. It was as follows :

"Estate of Mary A. Troost to J. Q. Watkins, Dr.

"To services rendered from July, 1869, to February, 1872, \$2,500."

This demand was allowed in the probate court to the amount of \$2,000, and on appeal to the circuit court, where the cause remained some years before being tried, the demand was there allowed in the sum of \$2,375, and the executors have appealed here.

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I. The statute requires that the person about to exhibit a claim against an estate shall serve upon the executor or administrator a notice, in writing, stating the nature and amount of the claim with a copy of the instrument, or writing, or account upon which the claim is founded. R. S., 1879, sec. 188. While it is true that in probate courts formal pleadings are not requisite, still common justice and ordinary honesty require that an account or statement of a matter, about which those in charge of the estate probably know nothing, should, when presented for allowance, at least, be sufficiently specific to apprise them of the facts involved, so that they can be prepared properly to protect the interests confided to their care, and thus prevent unjust demands from swallowing up the estate. It is difficult to conceive of a statement more vague than the one presented in this case. What the services were for, what was their nature, whether rendered on a salary, on a contract, general or special, or for what they were reasonably worth, or just when the "*services*" began, or just when they ended the paper filed does not show. Such attempts at statements or accounts have frequently met with rebuke at the hands of this court. *Casey v. Clark*, 2 Mo. 11; *Wathen v. Farr*, 8 Mo. 324; *Brashears v. Strock*, 46 Mo. 221; *Swartz v. Nicholson*, 65 Mo. 508.

Besides all that, when the cause reached the circuit court, where, under the statute, it was to be tried *de novo* and the executors, as they had the right, moved for a more specific and definite statement under the rulings in this court (*Bush v. Diepenbrock*, 20 Mo. 568; *Brashears v. Strock*, *supra*; *Gilmore v. Dawson*, 64 Mo. 310; *Rowland v. Railroad*, 73 Mo. 619) their motion was denied. This ruling was altogether erroneous, and cannot be permitted to stand. If, in ordinary cases, cases between living parties, it be necessary that a substantial statement of the facts constituting the ground of recovery be

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set forth in order that the defendant may make necessary preparations for his defence, then *a fortiori* is such statement necessary when like recoveries are sought against *the estates of the dead*. As the demand in question was insufficient, and as the trial court refused to have the same made sufficient by amendment, the objection of the defendants to the introduction of any evidence was well taken, and should have prevailed.

II. Since there was no evidence as to a special contract between plaintiff and the testatrix that she would pay him a salary of one thousand dollars per year as her agent or business manager, the first instruction given at the instance of the plaintiff is plainly erroneous.

III. The evidence offered on the part of the plaintiff is very vague and unsatisfactory, and it is difficult, if not impossible, to tell just what services were rendered or how much they were really worth. And in this connection it is not to be forgotten that plaintiff neither made, kept nor presented an account for his "services," during the two and one-half years and more that said services are now claimed to have been rendered. The failure in this respect affords some evidence which is adverse to the claim of plaintiff. *Aull Sqr. Bk. v. Aull's Adm'r*, 80 Mo. 199. As far as I am able to judge from the evidence the allowance was nothing less than exorbitant.

In order that a fair trial may be had, the judgment is reversed and the cause remanded. Judge Black not sitting, the other judges concur.

Day v. The Mechanics' & Traders' Insurance Co.

DAY V. THE MECHANICS' & TRADERS' INSURANCE COMPANY, *Appellant*.

1. **Insurance:** CHANGE OF POLICY BY PAROL. The terms of an open policy of insurance can be changed by a subsequent parol agreement between the contracting parties.
2. —: —. By the terms of an open policy of insurance, before an insurance of the property could be effected under it, an indorsement by the authorized agent of the insurer was required to be made either on the policy, or a book attached thereto, or the issuance of a certificate by an agent and signed by an officer of the company was necessary; *held*, that after the delivery of the policy it could be so modified by parol by agreement of the parties as to enable the policy holder to effect his insurance on shipments of property by him, by notice directed to the company's agent and deposited in the mail.
3. —: —. The policy contained the following provision: "The use of general terms or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein contained;" *held*, that said clause did not apply to and prohibit the modification of the terms of the policy above mentioned.
4. **Insurer:** ACTS OF AGENTS. The authority of the agents of the insurance company to consent to the modification of the terms of the policy may be inferred from the course of dealing with the insured and the recognition of these acts by the company.

Appeal from Lafayette Circuit Court.—HON. J. P. STROTHER, Judge.

AFFIRMED.

McKeighan & Jones for appellant.

(1) The court should have sustained appellant's objection to the witness, Winsor's, testimony, in regard to effecting insurance. The policy expressly provided that it should not be changed except "by a written

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or printed agreement expressed and indorsed on the policy." Winsor, being a mere special agent of the company, could not change the policy in any other way, except as authorized by the policy itself, and not then unless specially authorized and the authority was shown. *Hale v. M. M. F. Co.*, 6 Gray, 169; *Abbot v. Gatch*, 13 Md. 314; *Worcester v. Hatfield, etc., Ins. Co.*, 11 Cush. 265; *Carpenter v. Prov. Ins. Co.*, 16 Pet.; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5; *Ins. Co. v. Mowry*, 96 U. S. 544. (2) The court erred in permitting the agent to state what was necessary to be done to effect insurance, nor should it have allowed him to state how insurance was effected subsequent to the transaction in controversy. (3) There was no insurance of the shipment in controversy; the minds of the parties never met; the respondent prepared a proposal for insurance which was never received, much less accepted. (4) An open policy itself insures nothing and is not even a contract for any particular shipment; the contract takes effect on any shipment only after all the requirements of the original policy are complied with. *Parsons Mar. Insur.* 327. Under an open policy, the insurance is the subject of a special and distinct contract to be approved by the company and to be entered in the book attached to the policy. 2 *Ins. L. J.* No. 2. (5) Where the terms of a policy require an indorsement, it must be done or the company is not bound. *Phalto v. Ins. Co.*, 38 Mo. 248; *Edwards v. Ins. Co.*, 7 Mo. 382. (6) The evidence does not show any modification of the terms of the policy by the company's agent either authorized or unauthorized.

Wallace & Chiles and *John S. Blackwell* for respondent.

(1) There was no error in the court below in the admission of evidence on the part of the plaintiff. (2) There was no error in the court giving instructions numbered one, two, three, four and five, on the part of plaintiff.

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Parties may by a subsequent parol agreement upon a sufficient consideration, change or modify the terms of a written contract. *Henning v. Ins. Co.*, 47 Mo. 425; *Bunce v. Beck*, 43 Mo. 266; *Cummings v. Arnold*, 3 Met. 486; *Moore v. Ins. Co.*, 16 Mo. 98; *Kennebec v. Ins. Co.*, 6 Gray, 204. (3) The open or running policy, as modified, was both an agreement and standing proposition from defendant to insure plaintiff, on the compliance by plaintiff with certain conditions, and the acceptance by plaintiff of defendant's proposition, to insure by compliance with the conditions, viz.: Mailing notice per said form of application completed the insurance of the shipments of property as made. *Taylor v. Merchant's F. Ins. Co.*, 9 How. 390. (4) All the law requires is due diligence to send the notice within the proper time and it is sufficient to put it properly directed in the post office in season. (5) E. Winsor & Son were defendant's agents having authority to take applications for insurance, and the acts of such agents were the acts of the company. *Combs v. Ins. Co.*, 43 Mo. 148. (6) One dealing with the agent of a corporation has a right to presume, in the absence of knowledge to the contrary, that such agent has general authority. *Schmot v. Ins. Co.*, 2 Mo. App. 339; *Insurance Co. v. Wilkerson*, 13 Wall. 222. (7) The case was fairly submitted to the jury on correct instructions authorized by the evidence, and as the evidence was conflicting, this court will not weigh it. The jury found for plaintiff, and the judgment, we submit, is for the right party. There was no error in the court below materially affecting the merits of the action; the errors, if any, were in favor of and not "against the appellant," and the judgment below should be affirmed.

NORTON, J.—This suit was instituted upon an open policy of insurance dated fourteenth of March, 1881, issued by defendant to recover for a loss of wheat, sheep

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and wool lost by the sinking of the steamboat, "E. H. Durfee," in the Missouri river on the twenty-third of May, 1881. It is alleged in the petition in substance, that by said policy defendant agreed to insure and thereby insured plaintiff, for any one whom it may concern, lost or not lost, on all shipments of property on board of good seaworthy steamboats in the United States, as endorsed by the authorized agent of defendant at Lexington, Missouri, on said policy or on a book therein, stated to be attached thereto and made part thereof, or for which certificates properly signed by an officer of defendant are issued by the authorized agent of defendant limiting liability of defendant on property to five thousand dollars on one voyage for any one shipper. It is also averred that plaintiff was engaged in buying and shipping wheat, sheep, wool and other commodities; that he transacted this business at Wellington on the Missouri river, which was eight miles distant from Lexington, where E. Winsor & Son, the authorized agents of defendant, lived and transacted the business of said company; that in consequence of the small number of steamboats, navigating the Missouri river, and of those navigating it having no regular days or time for arriving at or departing from the said town of Wellington, plaintiff's only chance for shipping property on steamboats was by having the same at his warehouse at the steamboat landing, and shipping the same on steamboats as they might stop at Wellington in navigating said river; that in view of these facts, and the impossibility of plaintiff's using and making available to himself and defendant said policy by a strict and literal adherence to the terms thereof, in regard to endorsements thereon, or on a book to be attached thereto by the authorized agents of defendant at Lexington, or the issuing and signing of certificates by an officer of defendant, the contract terms and conditions of said policy subsequent to the making and delivery thereof were by the mutual

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assent, agreement, practice and acquiescence of plaintiff and defendant modified and changed to the extent that plaintiff was thereby permitted and allowed by defendant to make shipments of property under said policy on good seaworthy steamboats, and to give notice in a reasonable time of such shipments according to a form prescribed by defendants, to E. Winsor & Son, agents of defendant at Lexington, either through the mail between Wellington and Lexington in an envelope addressed and directed to said agents at Lexington, or by depositing the same enclosed and addressed to said agents, in the post office at Lexington. It is further alleged that under said open policy so modified and changed, plaintiff on the twenty-first of May, 1881, at the town of Wellington shipped on board the steamboat "E. H. Durfee," 1021 sacks of wheat of the value of \$3,000, fifty-eight head of sheep of the value of three hundred dollars, and five sacks of wool of the value of two hundred and twenty-five dollars, of which shipment he gave defendant notice by depositing the same on twenty-second day of May, 1881, in the post office at Lexington, enclosed in one of the letter envelopes previously furnished to plaintiff by said Winsor & Son, and to be by him used when shipments were made. The property thus shipped, it is alleged, was lost on the twenty-third of May, 1881, by the sinking of said steamboat and this suit is brought to recover the loss, defendant after notice of loss refusing to pay.

The answer of defendant contained a general denial of all the allegations of the petition, except as to their being a corporation, and also sets up in substance that the shipment in question was not indorsed on the policy or on a book attached thereto, neither was there any certificate properly signed by any officer of defendant issued by the agent of defendant. It also states that plaintiff never applied to defendant for insurance on said shipment, and that defendant never accepted said

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shipment as insured, either under the terms of said policy or upon any other terms. It further alleges in the answer that by the course of dealing between plaintiff and its agents at Lexington, the said plaintiff either mailed his application for insurance at Wellington or delivered it to the said agents, and that said agents on reception thereof, if accepted, endorsed the same on a book kept for that purpose; and that plaintiff's property only became insured upon such reception, acceptance and endorsement, or upon the issuance of a certificate as set forth in said policy.

It is clear under the terms of the policy, that before any property shipped by plaintiff became insured, that such shipment of the property was either to be endorsed by an agent of the defendant on the policy or on a book attached thereto, or for which certificates properly signed by an officer of the company and issued by the authorized agent of the company. And it is equally clear that the shipment made on the twenty-first of May, 1881, on board the steamboat "Durfee" was not endorsed either on the policy or on a book attached thereto, nor was any certificate issued as provided in the policy. But notwithstanding this it is claimed by plaintiff that after the delivery of said policy it was so modified by the agreement of plaintiff and defendant through their agents at Lexington, that when plaintiff made a shipment of property and gave notice thereof in a form furnished him by defendant, within a reasonable time, either by depositing said notice in an envelope directed to E. Winsor & Son, Lexington, Missouri, either in the post office at Wellington, or by delivering it in person to said agents, or by depositing the same in the post office at Lexington, that the property shipped should be insured from the time such notice was deposited either in the post office at Lexington or Wellington, or delivered in person to such agents. It is claimed on the other hand that the terms of the policy

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could only be changed by an agreement endorsed on the policy. And that this is shown by the following provision contained in said policy, namely: "The use of general terms, or anything less than a distinct, specific agreement clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein contained." It is clear under the above clause of the policy that any agreement made between plaintiff and defendant to waive any of the terms or conditions of the policy would be invalid, unless such agreement was endorsed on the policy, and would undoubtedly, when an insurance had been completed according to the terms of the policy, and a loss had taken place, apply to such conditions as are contained therein with reference to notice of such loss and proof of same and the time within which such notice and proof should be given and made.

If it had been intended by the parties that the terms of the contract should not be modified or changed, unless the agreement modifying it was endorsed on the policy, the intention could have been expressed by making the said clause read "shall not be construed as a waiver," modification or change of its terms, etc. If the policy in question had so expressed the intention of the parties, then the class of cases to which we have been cited by appellant's counsel, of which the case of *Hale v. M. M. F. Ins. Co.*, 6 Gray, 169, is one, would apply, where it is held that when by the terms of a policy subsequent insurance could only be allowed by the written consent of president, verbal consent could not be shown. That the contract between plaintiff and defendant embodied in the open policy could be modified and changed by a subsequent parol agreement is established by the following authorities: 1 Greenl. Evid., secs. 303-4; *Henning v. Ins. Co.*, 47 Mo. 425; *Bunce, Adm'r, v. Beck*, 43 Mo. 266; *Kennebec Co. v. Augusta*

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Ins. Co., 6 Gray, 204-14; *Canal Co. v. Ray*, 101 U. S. 522.

The evidence of plaintiff himself and that of E. Winsor & Son, the agent of defendant at Lexington, tended to show that subsequent to the delivery of the policy, in consequence of the fact that Wellington was distant about eight miles from Lexington, and the further fact that the arrival and departure of steamboats at and from the landing at Wellington was uncertain and unfrequent, in order to make said policy mutually beneficial, it was agreed between them that when plaintiff made a shipment, instead of requiring the same to be endorsed on the policy, or on a book attached thereto, or the issuance of a certificate signed by an officer of the company, that plaintiff should notify E. Winsor & Son, the agents of defendant, thereof by enclosing a notice or application, the form of which was furnished by said agents to him, in an envelope directed to them at Lexington, envelopes for that purpose having also been furnished him by said agents, and either delivering the same in person to said agents or depositing it either in the post office at Wellington or Lexington; that the rate of premium agreed upon (it not being fixed in the policy) should be three-fourths of one per cent. upon all shipments made, until notice should be given of a change and that such premium should be paid at the end of each month. That the shipment in question was made on the twenty-first of May, 1881, the steamboat "Durfée" with its cargo leaving Wellington early in the morning of that day; that plaintiff signed the form furnished him, as follows:

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"H. M. BLOSSOM & Co., }
 Gen'l Agents, St. Louis. }
 Certificate No. —.

"To the Mechanics' and Traders' Insurance Co., of New York.

{ Received at office.

"Wellington, May 21, 1881. Insurance is wanted under open policy, No. —; Lewis H. Day, applicant.

Risk No. —

Name of vessel or route.	From	To	Description of property	Am't.
E. H. Durfee.	Wellington	St. Louis	1021 sacks of wheat	\$3,000
			58 head of sheep	300
			5 sacks of wool	225

Rate premium, ———

"[Signed.]

LEWIS H. DAY."

That the notice or application was enclosed in one of envelopes also furnished by said agents, with a printed direction thereon, as follows :

"MESSRS. E. WINSOR & SON,

"Agents Mechanics' and Traders' Fire Ins. Co.,

"Lexington, Mo."

That on the evening of that day he went to the post office for the purpose of depositing said notice therein, to be mailed according to the direction thereon, and learned from the postmistress that the mail for Lexington had gone, and the mail would not again leave until the following Monday evening; that upon learning these facts, he placed the said letter and notice in the hands of one Charles Bowing to be deposited the next morning in the post office at Lexington; that Bowing deposited said letter and notice in the post office at Lexington on the evening of the next day, it being Sunday and the twenty-second day of May; that on Monday, the twenty-third day of May, the steamboat sunk, whereby all but a few dollars worth of the property was totally lost; that the notice of shipment was not in fact received by said Winsor & Son, and that they knew nothing of the

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shipment and loss till informed of it by plaintiff on the day or next after the loss. The evidence also tended to show that Winsor & Son, upon the receipt of any notice of shipment endorsed the same on a book kept by them for that purpose; that the premiums, on the goods insured were to be paid by plaintiff at the end of each month; that numerous shipments had been made by plaintiff under the policy in question, both before and after the date of the loss, for the recovery of which this suit is brought, and also that numerous shipments had been made under a like policy issued to plaintiff in 1880, and the course of dealing between the parties on such shipments, as to notice, was the same as that pursued in the present instance, and the invariable practice was, on the reception of these notices by Winsor & Son, to endorse the goods as insured from the date of mailing the notice and not from the time it was received; that if the notice was mailed on the tenth and not received till the fifteenth of the month, it would be entered up as of the tenth, the date of the application.

On the above state of facts which the evidence tended to prove, defendant requested the court to instruct the jury that the plaintiff could not recover. The court refused to grant the request and gave instructions on behalf of the plaintiff in substance and to the effect, that if for the purpose of making the open policy in question useful and profitable to both parties, it was, subsequently to the making thereof, by the mutual assent, practice and acquiescence of both parties, that the terms of said policy should be modified and changed to the extent of permitting and allowing plaintiff to make shipments on seaworthy steamboats navigating the Missouri river, whenever he should be ready to make such shipments while such steamboats were stopping temporarily at the landing in Wellington, and should give notice of such shipments, through Winsor & Son, on and by a form furnished him by defendant for that

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purpose, in a reasonable time, enclosed in envelopes directed to said agents at Lexington, and deposited in the post office either at Lexington or Wellington, then such modification of the contract authorized an insurance on property shipped by plaintiff on such steamboats, by his giving notice thereof according to the form furnished for that purpose and in the manner above specified, without such shipment being endorsed either on such policy, or on a book attached thereto, or without a certificate signed by an officer of the company and issued by its agents; and that if the jury further believed that the shipment in question was made on the twenty-first of May, 1881, on the steamboat "E. H. Durfee," and that it was seaworthy, and that plaintiff caused a notice of such shipment according to the form prescribed, by depositing the same in the post office at Lexington directed to said agents, Winsor & Son, on the twenty-second day of May, and that it was agreed that the premium of three-fourths of one per cent. should be paid by plaintiff, on shipments made during the month at the end of the month, and that the goods shipped were lost by sinking of the said steamboat in the Missouri river on the twenty-third of May, they should find for plaintiff the value of the goods so lost, deducting the unpaid premium.

The instructions given by the court come within the principle stated on page 317, 1 Parsons on Marine Insurance, where it is said: "An open policy is so called because an insurance is provided on goods to be afterwards specified and declared. Running or open policies are now common. Merchants engaged in a certain trade wish to keep all their merchandise constantly insured. They effect this, not by a policy on every adventure, but by one policy sufficiently general in its terms to cover all the expected shipments; and then as the insured has notice of each he indorses it on the open policy. Sometimes the policy requires that each indorsement shall be

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assented to by the insurers before the insurance attaches to it. In other policies the indorsement has this effect of itself. By indorsement of the policy is not meant that the insured may make his own indorsement, at his own time and pleasure, on the copy of the policy in his own hands, and then this endorsement necessarily and by its own force brings the property under insurance without a communication to the insurers. For the indorsement must be made on the copy of the policy in the hands of the insurers, or at all events a communication must be made to them. If, however, the terms of the policy give to the insured the right to specify and indorse certain shipments, and the insured in due time and manner specify and declare such a shipment and request of the insurers the indorsement thereof and the insurers refuse this without sufficient cause, they would be held as effectually as by an indorsement."

Under the terms of the original policy in this case, before an insurance of property shipped could be effected under it, an indorsement thereof by an authorized agent of defendant was required to be made either on the policy or a book attached thereto, or the issuance of a certificate by an agent and signed by an officer of the company. If, after the delivery of this policy, it was so modified and changed in these respects by the mutual consent and agreement of the parties, as only to make it necessary to effect an insurance on plaintiff's goods or property when shipped, for him to give notice to defendant in the form of an application of such shipment, naming the vessel on which such shipment was made and its destination, when it was made, stating what property was shipped and its value, either by depositing the same in the post office at Wellington or Lexington, directed to Winsor & Son, defendant's agents at Lexington, and such application or notice was within a reasonable time so deposited, then the property so shipped was insured under said policy so modified from

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the time such notice was thus deposited. *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 398.

The authority of Winsor & Son as the agents of defendant at Lexington to make the modification in the contract referred to in the evidence may be inferred from the course of dealing with plaintiff and recognition of these acts by the company. *Combs v. Ins. Co.*, 43 Mo. 148; *Ang. & Ames on Corp.*, sec. 284; *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray, 204; *Northrup v. Ins. Co.*, 47 Mo. 435. The theory on which the court tried the case, as evidenced by its instructions, we think was the correct one, and perceiving no error in the record, materially affecting the merits of the action, the judgment is affirmed. All concur.

 TURPIN *et al.* v. TURPIN *et al.*, Appellants.

1. **Partition: FINAL JUDGMENT: APPEAL.** In a partition suit the order of sale is not a final judgment from which an appeal will lie.
2. —: **SALE: WILL.** Where a sale is required to effect a partition of lands under a will, the proceeds will stand in lieu of the land and the amount of the sale, and not the value of the land fixed by the commissioners, will determine the sum to go into the computation for division.
3. **Hotchpot: ADVANCEMENT.** The doctrine of bringing advancements into hotchpot applies only in cases of intestacy, or where there is a surplus undisposed of by the will.

Appeal from Carroll Circuit Court.—HON. JAMES M. DAVIS, Judge.

APPEAL DISMISSED.

John L. Mirick for appellants.

- (1) The court should not have made a partition in

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contravention of the will. 62 Mo. 364. (2) Nancy Robertson's share under the will could only be ascertained by an appraisement of the whole estate. When this was done and the appraisement disclosed the fact that her share of the estate exceeded five thousand dollars, then, *eo instanti*, she and her children by the terms of the will, were invested with the whole of the Saline county lands. (3) That part of the order of the court which requires the executors to sell the portion of the Saline county lands lying east of the road at not less than two thousand dollars, contravenes the whole will, and is an attempt of the court to engraft an addition on that instrument.

Hale & Sons for respondents.

(1) The judgment of the lower court giving to each of the heirs one-seventh is in exact conformity with the will, and as the will does not provide any method for ascertaining the *quantum* or value of said several interests, the method of executing the testator's intention is left to the law. *Chouteau v. Paul*, 3 Mo. side p. 263. (2) Nancy Robertson and her children, having joined in the deed for the sale of the property, are estopped from disputing the mode of ascertaining its value. (3) The order of the court directing the sheriff to sell the Saline county land was not a final judgment from which an appeal or writ of error would lie. *State, etc., v. Satterfield*, 54 Mo. 394. (4) It was proper to add the advancement of Frank Turpin to ascertain the value of the whole. *Batton v. Allen*, 4 Hale (N. J.) 105. (5) The testator in this case devised the same quantity of estate to H. B. and Wm. Turpin that they would have taken without any will, and hence they took by descent and not by purchase, and in such circumstances H. B. and Wm. Turpin are chargeable with the lands deeded to them by their father after he executed his will. 4 Kent (11 Ed.) 507, 594; *Ellis v. Ellis*, 7 Cush. 161. This is the established com-

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mon law rule of property in this state. We have no statute changing this rule, nor have we, like some of the states, adopted the statutes of 3 and 4 William, chap. 4, 106; 4 Kent's Com. p. 454, note *c*; 3 Wash. pp. 17-18, and note p. 541; *Whiting v. Whiting*, 14 Mass. 88-90; *Van Kent v. Dutch Church*, 20 Wend. (N. Y.) 469; Williams on Real Property, 181; 2 Washburn on Real Property, 431.

BLACK, J.—This a proceeding between the devisees of Jeremiah Turpin for the partition of real estate. The testator gave his property, real and personal, to his wife, who was dead at the institution of this suit, for life, then to his seven children in equal parts, charging his son Frank with an advancement of three thousand dollars, and constituting two of his sons trustees for Nancy Robertson as to her share. By the codicil, Nancy is to have certain lands in Saline county at a valuation of five thousand dollars, if her share equals that amount, and if not, then that part thereof west of the road at two thousand five hundred dollars, and the other portion is to be sold and the proceeds divided. The commissioners appraised the whole estate, putting the Saline county land at five thousand dollars, at an aggregate amount which would give to her the whole of that tract. They also reported that the other lands could not be divided in kind. Thereupon the court ordered a sale of the property, other than that in Saline county. The parties then sold the lands not situated in Saline county at private sale, all joining in the conveyance, at a price which made the share of Nancy less than five thousand dollars. Thereupon the court ordered a sale of that part of the Saline county land not lying west of the road. From this order and before any sale or report thereof, this appeal was taken.

1. Following the opinion in *Murray v. Yeates*, 73 Mo.14, and authorities there cited, the order of sale is not a

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final judgment within the meaning of section 3391, Revised Statutes, from which an appeal will lie. It is the order of approval and distribution which constitutes the final judgment. This appeal was, therefore, premature and must be dismissed.

2. To avoid the delay and expense of another appeal we are asked to consider certain other questions, which we proceed to do. For Mrs. Robertson it is contended the valuation fixed by the commissioners must control. While the testator valued the land to go to her, he fixed upon no method of determining the value of the other lands. He must have had in view the law as to that. He evidently contemplated an equal distribution of the property, not valued in the shape in which it became necessary to put it to effect a distribution. Had the property been susceptible of division in kind, the report of the commissioners when approved would have ended the matter. A sale being required in order to effect a partition, the proceeds would stand in lieu of the land, and the amount of the sale would determine the amount to go into the computation for a division, and not the value fixed by the commissioners. Instead of a public sale the parties made a private sale, as they had a right to do, and that is conclusive upon all the parties as to the value of the land so sold and the court properly so ruled.

3. On the part of the plaintiffs it is insisted that H. B. and Wm. J. Turpin should each be charged with three thousand dollars by way of advancement, because of land of that value conveyed to them by the father in his lifetime. One of these deeds, as we understand the record, was made before the date of the will, the other thereafter, but before the date of the codicil. No charge is made against these devisees by the will or codicil, though the son Frank is thereby charged with three thousand dollars. The doctrine of bringing advancements into hotchpot applies only in cases of intestacy. 4 Kent Com. [13 Ed.] p. 418; 2 Williams Ex. [Am. notes] p. 1608. And this is

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often said to be the rule where there is a surplus undisposed of by the will. *Marshall et al. v. Rench et al.*, 3 Del. Ch. 254; *Needles' Ex. v. Needles et al.*, 7 Ohio St. 432. In this state the matter is governed by statute and the statute only applies to children of persons dying intestate. Secs. 2166-7, R. S. Other provisions as to advancements are made as to children not named or provided for in the will. Sec. 3970, R. S. Here the children are all provided for in the will; one is by the will charged with an advancement, the others are not, though two were advanced before the date of the codicil.

The will must control. The appeal is dismissed. All concur.

THE STATE V. KENNEDY, *Appellant*.

1. **Criminal Law : LARCENY FROM DWELLING.** Larceny committed in a dwelling house is grand larceny without reference to the value of the property stolen. R. S., sec. 1309.
2. — : **BURGLARY AND LARCENY : PRACTICE.** In a prosecution for burglary and larceny, the defendant may be acquitted of the one and convicted of the other.
3. — : **INSTRUCTION : RECENT POSSESSION OF STOLEN PROPERTY : PRESUMPTION.** An instruction that one found in the possession of property recently stolen is presumed to be the thief, and if he fails to account for his possession in a manner consistent with his innocence, the presumption becomes conclusive against him, is properly given in a case where there is no evidence as to the good character of the defendant.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

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Robt. W. Goode for appellant.

If defendant is guilty of larceny it is only petit larceny, as the property lost was not worth over fifteen dollars, and the alleged larceny was not committed in a dwelling house, but in a car driver's room over a saloon. R. S., secs. 1297, 1309. The instruction in regard to possession of stolen property as presumptive evidence of guilt should have been given as offered by the defendant's counsel. That given by the trial court has been condemned by this tribunal more than once. *State v. Bruin*, 34 Mo. 540; *State v. Gray*, 37 Mo. 463; *State v. Robbins*, 65 Mo. 443; *State v. Kelly*, 73 Mo. 608; *State v. Sidney*, 74 Mo. 390.

B. G. Boone, Attorney General, for the state.

It is admitted, on the part of the state, that the evidence was not sufficient to sustain the charge of burglary. The charge of larceny was sufficiently established to justify the verdict. The larceny having been committed in a dwelling house, the value of the goods taken is immaterial. R. S., sec. 1309; *State v. Butterfield*, 75 Mo. 297; *State v. Brown*, *Ib.* 317; *State v. Bruffey*, 79 Mo. 389. The court of appeals was authorized in reversing as to the burglary, and affirming as to the larceny. *State v. Alexander*, 56 Mo. 131; *State v. Owens*, 79 Mo. 619.

NORRIS, J.—Defendant was indicted in the criminal court of the city of St. Louis for burglary and larceny, committed in the dwelling house of one James Renn. He was tried and convicted of both burglary and larceny, and his punishment assessed at four years imprisonment for the burglary, and three years for the larceny. On defendant's appeal to the St. Louis court of appeals, the judgment was reversed as to the bur-

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lary and affirmed as to the larceny, and he brings the cause here by appeal.

It being conceded by the state that the evidence was not sufficient to sustain the conviction of defendant for burglary, the only question for determination presented by the record is whether his conviction for grand larceny was proper, it being admitted that the coat he was convicted of stealing was of less value than thirty dollars. The evidence in the case shows that the larceny was committed in a dwelling house, and this being so, by virtue of section 1309, Revised Statutes, as construed by this court in the cases of *State v. Brown*, 75 Mo. 317, and *State v. Butterfield*, 75 Mo. 297, the offence is grand larceny, without reference to the value of the property stolen. The cases of *State v. Owens*, 79 Mo. 619, and *State v. Alexander*, 56 Mo. 131, fully warranted the action of the St. Louis court of appeals in reversing the judgment as to burglary and affirming it as to the larceny.

There being no evidence in the case as to the good character of the defendant, but on the contrary evidence showing that his character was not good, the instruction given as to the presumption arising from the recent possession of stolen goods is fully warranted by *State v. Kelly*, 73 Mo. 608.

Finding no error in the record the judgment is affirmed.

HENRY, C. J., DISSENTING.—I do not concur. The court instructed the jury that one found in the possession of property, recently stolen, is presumed to be the thief, and, if he fails to account for his possession, in a manner consistent with his innocence, the presumption becomes conclusive against him. I do not think that this is, or ever was, the law, or ever ought to be.

I agree with

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THE STATE V. HAYES, *Appellant*.

1. **Practice, Criminal : JURISDICTION : CHANGE OF VENUE.** Where the judge of the St. Louis criminal court is disqualified for any of the reasons mentioned in Revised Statutes, section 1877, he is authorized by Revised Statutes, section 1881, to call in the judge of another circuit to try a defendant's application for a change of venue, and the judge of such other circuit becomes thereby possessed of jurisdiction of the cause until its final determination, notwithstanding the withdrawal of the application by his consent, after the cause has been reversed in the Supreme Court.
2. **Construction : STATUTE : CONSTITUTION.** Section 1902, of the Revised Statutes, is not unconstitutional upon the ground of being a special law, nor is it unconstitutional because in cities of more than one hundred thousand inhabitants it gives the state a greater number of peremptory challenges than in other localities.

Appeal from St. Louis Criminal Court.—Trial before
HON. CHARLES G. BURTON, Judge of the Twenty-
fifth Judicial Circuit.

AFFIRMED.

James J. McBride for appellant.

(1) Judge Burton had no lawful right or jurisdiction to try the cause, and he committed error in overruling defendant's motion to vacate the order appointing him, defendant's application for a change of venue having been previously withdrawn by leave of court, and Judge Van Wagoner having been lawfully installed judge of the St. Louis criminal court, in place of Judge Laughlin. (2) The court erred in allowing the state fifteen instead of eight peremptory challenges against the objection of the defendant. Section 1902, of the Revised Statutes, allowing this number of challenges to the state in cities having over one hundred thousand inhab-

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itants, is unconstitutional. It is a special law. *State ex rel. Harris v. Hermann*, 75 Mo. 352. Said section is also in violation of section 22, article 2, of the State Constitution (bill of rights), which guarantees to every person charged with crime a speedy and public trial by an impartial jury of the county—and of section 30, article 2, which provides that no person shall be deprived of life, liberty, or property, without due process of law—and also of section 1, of the fourteenth amendment of the constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property, without due process of law (the law of the land), nor deny to any person within its jurisdiction the equal protection of the laws. *In re Jilz*, 3 Mo. App. 243; *State v. Hayes*, 81 Mo. 586; 1 Bish. on Crim. Proc. 891.

B. G. Boone, Attorney General, for the state.

(1) The action of the trial court was proper in overruling defendant's motion to vacate and annul the order by which Judge Burton was authorized to try the case. Judge Burton was clothed with jurisdiction by the order of the criminal court, and retained it until the termination of the cause. R. S., secs. 1879, 1881; *State v. Hayes*, 81 Mo. 574. This court has held that defendants cannot, after disqualifying the regular judge by the allegation of prejudice, and another has been called in to try the case, proceed to also disqualify and depose the latter by a like allegation. *State v. Greenwade*, 72 Mo. 298. (2) Section 1902 of the Revised Statutes, allowing the state fifteen peremptory challenges in all cities having a population of over one hundred thousand inhabitants, is not violative of section 53, article 4, of the constitution of the state, upon the ground of being a special law. *State ex rel. Lionberger v. Tolle*, 71 Mo. 650; *State ex rel. v. Hermann*, 75 Mo. 340, and cases cited; *Ruther-*

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ford v. Heddens, 82 Mo. 388; *Welker v. Potter*, 18 Ohio St. 85; *Wheeler v. Philadelphia*, 77 Pa. St. 333; *Com. v. Patton*, 88 Pa. St. 285. Section 1902, *supra*, is not in violation of section 1, article 14, of the constitution of the United States. The subject of peremptory challenge has always been under legislative control, and it is held by a long and unbroken line of decisions that the legislature has power, at all times, to increase or diminish the number of peremptory challenges to be allowed the state or the defendant in a criminal case. *Thom. & Mer. on Juries*, sec. 165, and cases cited under note 1; *Stokes v. People*, 53 N. Y. 164; *Waller v. People*, 32 N. Y. 147; *Com. v. Walsh*, 124 Mass. 32; *Hartzell v. Com.*, 40 Pa. St. 462.

SHERWOOD, J.—This cause is here for the second time. The result of the defendant's first appeal and our rulings then made, are reported in 81 Mo. 574 *et seq.* The defendant is charged in the indictment with the murder of Philip A. Mueller, and after our reversal of the judgment, has been tried again, the trial resulting in his conviction of and sentence for murder in the first degree, the second trial resulting in the same way as did the first one. This appeal presents but two points for consideration: First. Whether Judge Burton had jurisdiction to try the *cause*; second, whether section 1902, Revised Statutes, 1879, is a valid law.

I. Relative to the first point: The defendant, after the judgment of reversal and the cause was sent back for a new trial, withdrew his application for a change of venue, and subsequently filed his motion to set aside and vacate the order made by Judge Laughlin, appointing Judge Burton to hear and determine the defendant's application for a change of venue, and to try and determine the cause. This motion was denied, and properly denied. Section 1881, Revised Statutes, 1879, fully authorized the making of the order which the defendant

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sought to have set aside. Judge Burton, by that order, being clothed with jurisdiction, retains that jurisdiction until the final determination of the cause. This is what the statute says in express terms, and so it was ruled when this cause was here before. *State v. Hayes, supra*. It follows, from these premises, that the withdrawal of the defendant's application for a change of venue did not divest Judge Burton of the jurisdiction with which he became invested in consequence of the order in that behalf previously made.

II. The second point is equally clear. Section 1902 is valid, and not obnoxious to any objections on the score of being unconstitutional. It is not a special law, because it applies to all cities having a population of over one hundred thousand inhabitants; applies as well to the *future* as to the *present*, and in this is plainly distinguishable from the "notary act" discussed in *State ex rel. Harris v. Hermann*, 75 Mo. 340. Nor does the section in question impinge upon the constitutional rights of the defendant by reason of giving the state the right, in certain localities, of peremptorily challenging a larger number of persons than it possesses in other localities. Such power, on the part of the state, does not, under the very terms of the section, diminish a defendant's right to the same number of challenges which he possesses alike in cities or in the country. If the section under discussion had deprived a defendant, when tried in a certain locality, of the usual number of peremptory challenges, a different question might have been presented, one not necessary to be now considered. This subject of the right of the state and of defendant to peremptory challenges, is fully discussed by a learned author and the cases which he cites. 1 Bishop on Crim. Proc., sec. 940, and cases cited. The views here expressed are in accord with those authorities.

Having discussed the only errors of which complaint is made, and finding them unfounded, it remains but to

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say that the judgment is affirmed, and to order that the sentence of the law be carried into execution. All concur.

HIPSLEY, *Appellant*, v. THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAILROAD COMPANY.

1. **Railroads : COMMON CARRIERS : PERSONAL INJURIES : NEGLIGENCE : BURDEN OF PROOF.** Where in an action by a passenger against a railroad company for damages for injuries caused by the derailment of the latter's train, the evidence shows that the plaintiff was injured without any fault on his part, a *prima facie* case is made out for him, and the *onus* is cast upon the defendant of relieving itself from responsibility by showing that the injury was the result of an accident which the utmost skill, foresight and diligence could not have prevented.
2. ——— : ——— : ——— : **PRACTICE.** In such action, where the evidence on the part of the plaintiff makes out a *prima facie* case for him, which is rebutted by the evidence on the part of the defendant, it is error to take the case from the jury by instruction, and they should be allowed to pass upon the credibility of the witnesses and the weight of their testimony.
3. **Practice : FINDING OF JURY, WHEN SET ASIDE.** When the right of the jury to pass upon the credibility of witnesses and weight of evidence is abused by them, the trial court may set aside their verdict on proper motion, and take the verdict of another jury, or the Supreme Court will grant a new trial where it appears that the verdict is so clearly against the weight of evidence that it must have been the result of passion or prejudice.
4. **Railroads : PERSONAL INJURIES : EVIDENCE.** In an action by a passenger against a railroad company for damages for injuries sustained by the derailment of the latter's train, evidence that defendant, several months after the accident, repaired its road in various places by putting in new rails and ties is inadmissible; and the plaintiff's evidence should be confined to the condition of the road bed at the place of and in the immediate vicinity of the accident at the time it occurred, and he should not be allowed to show

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that accidents had previously occurred on other parts of defendant's road.

Appeal from Nodaway Circuit Court.—HON. H. S. KELLEY, Judge.

REVERSED.

Johnston & Anthony for appellant

(1) Plaintiff should not have been confined to showing the condition of the road at the immediate place of the accident and at the time of its occurrence. He should have been allowed to show the general bad condition of the road. *Sheldon v. Railroad Co.*, 14 N. Y. 218; *Shearman & Redf. on Neg.*, p. 397, sec. 333; *Henry v. Railroad Co.*, 50 Cal. 176. (2) The court erred in sustaining the instruction in the nature of a demurrer to plaintiff's evidence. For, when plaintiff had shown that he was a passenger on defendant's cars, and while being carried, received injury without fault on his part by the train being thrown from the track, he had without more made out a *prima facie* case; on such showing the law raises the presumption of negligence on the part of defendant, entitling plaintiff to judgment, and shifts the burden upon the defendant to show no negligence. *Shear. & Redf. on Neg.*, sec. 280; *Edgerton v. Ry. Co.*, 39 N. Y. 227; *Young v. Kinney*, 28 Ga. 111; *Fairchild v. Cal. Stage Co.*, 13 Cal. 599; *Phila. & Read. Ry. v. Derby*, 14 How. 468; *Pittsb. & Cin. Ry. v. Thompson*, 56 Ill. 138; *Lemon v. Chanslor*, 68 Mo. 340; *Meier v. Pa. Ry.*, 64 Pa. St. 230; *Stokes v. Saltonstall*, 13 Pet. 181; *Ry. Co. v. Pollard*, 22 Wall. 341. Where plaintiff makes out a *prima facie* case, which is rebutted by defendant's testimony, if true, the case should go to the jury that they may pass upon the credibility of the witnesses and weight of the evidence. *Dougherty v. Ry. Co.*, 9 Mo. App. 478; *Brown v. Ry. Co.*, 13 Mo. App.

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462; *Routsong v. Ry. Co.*, 45 Mo. 236; *Emerson v. Sturgeon*, 18 Mo. 170; *Kelly v. Ry. Co.*, 70 Mo. 607; *Edgerton v. Ry. Co.*, 35 Barb. 193; *Sullivan v. Ry. Co.*, 30 Pa. St. 339; *Kenney v. Ry. Co.*, 80 Mo. 573.

Strong & Mosman for respondent.

(1) The court did not err in confining the proof to the immediate locality of the accident. *Kinney v. Ry. Co.*, 70 Mo. 251; *Moody v. Ry. Co.*, 68 Mo. 470; *Ry. v. Huntley*, 38 Mich. 537; *Reed v. Ry. Co.*, 45 N. Y. 574; *Coal v. Ry. Co.*, 60 Mo. 227; *Lester v. Ry. Co.*, 60 Mo. 265; 4 Md. 242. (2) Evidence of other wrecks was not admissible. *Davis v. Ry. Co.*, 8 Oreg. 172; *Sherman v. Kortright*, 52 Barb. 267; *Jacques v. Ry. Co.*, 41 Conn. 61; *Hudson v. Ry. Co.*, 59 Iowa, 581; *Parker v. Portland Co.*, 69 Me. 173; *Bank v. Ocean Bank*, 60 N. Y. 278-295; *Warner v. Ry. Co.*, 44 N. Y. 465; *Robinson v. Ry. Co.*, 7 Gray, 92, 95; *Maguire v. Ry. Co.*, 115 Mass. 239. Besides the fact was disproved. (3) (a) There was no competent evidence tending to show that the speed was too great. *Huntley v. Ry. Co.*, 38 Mich. 537. (b) There was nothing in the evidence tending to show that the rate of speed had anything to do with causing the accident. *Powell v. Ry. Co.*, 76 Mo. 82; *Lord v. Ry. Co.*, 82 Mo. 139. (c) It would have been error to submit that question to the jury. *Brasburg v. Ry. Co.*, 50 Wis. 231. (d) From the fact that a person after the happening of an accident, makes improvements, or changes, it does not follow that they were made because the accident happened, nor is it an evidence that the original condition was negligent. The fact of repairs is not evidence of negligence. *Dale v. Ry. Co.*, 73 N. Y. 468; *Dougan v. Transportation Co.*, 56 N. Y. 1; *Hudson v. Ry. Co.*, 59 Iowa, 58; *Ely v. Ry. Co.*, 77 Mo. 34, 37; *Reed v. Ry. Co.*, 45 N. Y. 574. (4) An adequate cause having been shown for throwing the car from the track, and there being no other cause shown that must be presumed to be

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the true cause. *Kendall v. Boston*, 118 Mass. 234-6. The evidence for defendant fully explained the cause of the accident, and was in perfect harmony with the most exact care on the part of defendant. The plaintiff did not attempt to rebut it. It was perfectly consistent with all the facts given in the case. Under such circumstances the jury could not disregard it. *Ry. Co. v. Packwood*, 7 Am. and Eng. Ry. Cases, 584; *Woodward v. Squires*, 39 Iowa, 438; *Ry. Co. v. Talbott*, 7 Am. and Eng. Ry. Cases, 587; *McPadden v. Ry. Co.*, 44 N. Y. 478. And it was the duty of the court to take the case from the jury. *Ry. Co. v. Burnes*, 64 Md. 113; *McPadden Case*, 44 N. Y. (5 Hand.) 478; *Lockwood v. Ry. Co.*, 6 Am. and Eng. Ry. Cases, 159, 160.

NORTON, J.—Plaintiff, who was a passenger on defendant's road, to be carried from the town of Bolckow, in Andrew county, to Hopkins, in Nodaway county, brought this suit to recover damages for injuries sustained by him caused by the derailment of the train on which he had taken passage. After all the evidence, both on the part of the plaintiff and defendant, was introduced the court at defendant's instance gave an instruction that under the pleadings and evidence plaintiff was not entitled to recover, and took the case from the jury. From the judgment of the court in refusing to set aside the non-suit which this action compelled the plaintiff to take, he prosecutes this appeal and assigns for error the action of the court in refusing to receive proper evidence and in giving said instruction.

The evidence on the part of plaintiff established the fact that he was a passenger in one of defendant's cars on the seventh of January, 1881; that on the night of that day, about seven o'clock, all the train except the engine and baggage car was derailed, and the car in which plaintiff was seated was thrown down an embankment, in consequence of which he received injuries the

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nature of which were testified to by himself and a physician. This was all the evidence on the part of plaintiff. The defendant, to overthrow the *prima facie* case thus made, put in the evidence of a number of witnesses, all of whom concurred in stating that the train in question was derailed by reason of the breaking of a rail; that the rail which broke was a good smooth, sound rail, neither worn nor shattered; that at the place of the accident the road was straight and well ballasted with cinders; that the ties were good sound oak ties; that the rails were well spiked with four good spikes to each tie; that the break was a fresh break, and disclosed neither flaw, crack nor other defect in said broken rail; that the speed of the train was from twenty-two to twenty-five miles per hour; that it was extremely cold the night of the accident; that rails, whether of iron or of steel, would break in cold frosty weather, and that there was no known way to anticipate or prevent this; that rapid speed on a straight track would not be more likely to break a rail than a slow rate, but would be likely to cause a more serious result or accident if a rail did break. The plaintiff offered no evidence in rebuttal.

In the case of *Lemon v. Chanstor*, 68 Mo. 341, we had occasion to consider the rights of a passenger and the duty under the law which that relation cast upon the common carrier, and it was there held that when the evidence shows that a passenger, without fault of his own, receives injury by the overturning or breaking down of the vehicle in which he is being carried, that a *prima facie* case is made out for him, and the *onus* is cast upon the carrier of relieving himself from the responsibility by showing that the injury was the result of an accident which the utmost skill, foresight and diligence could not have prevented. This rule was applied in a case where horse power and a hack were used by the carrier for carrying passengers, and it applies with equal if not greater force when the more powerful instrumentality of steam

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is used as the motive power. While carriers are not insurers of the absolute safety of passengers and are not responsible for inevitable and unavoidable accidents, regard for the safety of human limb and life has led to the adoption of the rule announced. It follows from this ruling that plaintiff having offered evidence tending to prove that he was a passenger on defendant's train, and that he was injured without any fault on his part, by the derailment of the train, made out a *prima facie* case entitling him to a verdict, unless it was rebutted and overthrown by the evidence of defendant showing that the accident was not the result of that want of care and vigilance, which the law made it obligatory on defendant to bestow.

It is contended by appellant that inasmuch as juries are the sole judges of the credibility of witnesses and the weight of their evidence, that it was their province, and not that of the court, to pass upon the credibility of the witnesses and the weight to be given their evidence, and that in doing this and giving the instruction objected to the court invaded the province of the jury. The point made, we think, is fully sustained by the following cases: *Kenney v. H. & St. Jo. Ry. Co.*, 80 Mo. 573; *Gregory v. Chambers*, 78 Mo. 208-9; *Meyers v. Union Trust Co.*, 82 Mo. 238; *Bryant v. Wear*, 4 Mo. 106; *McAfee v. Ryan*, 11 Mo. 365; *Seamboat v. Matthews*, 28 Mo. 248; *Bradford v. Rudolph*, 45 Mo. 426. The facts stated by defendant's witnesses, if established to the satisfaction of the jury, would unquestionably constitute a complete defence to plaintiff's action. Where the right of juries to pass upon the credibility of witnesses and the weight of their evidence is abused by them in arbitrarily disregarding the uncontradicted evidence of witnesses, disinterested and unimpeached either by their manner of testifying, or otherwise, the corrective is to be found in the right of the *nisi prius* judge to set aside the verdict on proper mo-

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tion, and take the verdict of another jury, or by the action of this court whenever it appears in a case that the verdict of a jury is so clearly against the weight of evidence that it must have been the result of passion or prejudice.

The court did not err, either in refusing to allow plaintiff to show that several months after the accident defendant repaired its road by putting in new rails and ties in various places (*Ely v. Ry.*, 77 Mo. 34), nor in confining plaintiff's evidence to the condition of the road bed at the place of and immediate vicinity of the accident and to its condition at the time of the accident; nor in refusing to allow plaintiff to show that accidents had previously occurred on other parts of defendant's road. The fact that the road in other places may not have been in good condition had no tendency to prove that it was in a bad condition at the place where the accident in question occurred. Judgment reversed and cause remanded. All concur.

THE STATE V. HIGGINS, *Appellant*.

Criminal Law : LARCENY : ASPORTATION. In larceny the caption and asportation consist in removing the property alleged to have been stolen from the place where it was before ; it need not be taken out of the room and carried away.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Robt. W. Goode for appellant.

B. G. Boone, Attorney General, for the state.

The State v. Higgins.

HENRY, C. J.—The defendant and one McGuire were jointly indicted at the May term, 1883, of the St. Louis criminal court, for burglary and larceny, alleged to have been committed on the twenty-ninth of April, 1883. At the March term, 1883, defendant, Higgins, having been granted a severance, had a trial and was convicted of both burglary and larceny, and sentenced to three years imprisonment in the penitentiary for the burglary, and two years for the larceny. He has appealed from the judgment of the court of appeals, affirming that of the criminal court, and in the brief filed by his counsel, which is a model of brevity, he insists that "the record shows no proof of the larceny by defendant, of a single cent, and only presumptive proof of the burglary." This is the only question we are asked to consider.

The testimony for the state was that of Frank Ritter, who testified that he was the son of Frank Ritter, who owned the saloon in which the alleged burglary was committed. That about two o'clock in the morning he locked up the saloon and left ten dollars in the till for the bar keeper, who came on watch about half past five or six a. m.; that he then bolted the front door and locked the rear door from the outside. When he returned the next day he found that the bolt had been broken off of the front door. Rabmeyer testified to facts sufficient to establish the burglary against the defendant, and, also, that when he and the officers who arrested him got to the saloon they found the till on the floor, and some money scattered upon the floor, and that they picked up \$1.80. The testimony of O'Donnell and Viehle was to the same effect.

It is true, as urged by appellant's counsel, that there is no proof that any of the money was taken out of the saloon by the burglars, but in an indictment for larceny the *caption* and *asportation* consist "in removing the property alleged to have been stolen from the place where

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they were before, though they be not quite carried away." 3 Greenleaf's Evidence, sec. 154. As, "where a prisoner had lifted a bag from the bottom of the boot of a coach, and was detected before he got it out of the boot, it was held a complete asportation." *Rex v. Walsh*, 1 Mood. C. C. 14; 3 Greenleaf's Evidence, sec. 154.

The judgment is affirmed. All concur, except Norton, J., absent.

CATTELL, *Appellant*, v. THE DISPATCH PUBLISHING COMPANY.

1. **Civil Practice: VERDICT.** A jury in an action for libel returned into court a verdict, "We find no cause of action," and on their attention being called by the court to its insufficiency, and that it should be in form a finding for the defendant, they declined to make the change. *Held*, that it was the duty of the court to direct the jury to retire to further consider their verdict, and to return one in proper form for plaintiff or defendant.
2. ———: ———. Where a verdict is imperfect and informal the court may direct the jury to amend it, and may direct them to return to the jury room for that purpose.
3. ———: ———. It is the duty of the court to see that improper and informal verdicts are not entered on its records.
4. **Motion for New Trial: PRACTICE.** A party is entitled to four working days within which to move for a new trial or in arrest of judgment. Sundays should not be counted.

Appeal from St. Louis Court of Appeals.

REVERSED.

Brown & Hamm for appellant.

(1) The court erred in withdrawing an instruction from the jurors after they had retired to deliberate on

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their verdict. Thompson on Charging the Jury, p. 131. (2) The court had no right whatever to direct the jurors as to which party they should find for, and when the court suggested to the jury that their verdict should be, "We, the jury, find for the defendant," it was error, and tended to prejudice the jury against the plaintiff, and in favor of the defendant. Thompson on Charging the Jury, sec. 54; Proffat on Jury Trials, sec. 457. If the court was dissatisfied with the verdict as rendered by the jury, it was the duty of the judge to either discharge the jury, or send them back for further deliberation. (3) The verdict is utterly senseless and outside the province of the jury. Whether the plaintiff had a cause of action is a question of law and not of fact; and the court had already ruled that there was a cause of action. Proffat on Jury Trials, secs. 382, 375. (4) The verdict was insufficient to support the judgment. Bishop's C, P., sec. 1004 (2 Ed.); Hawkin's Pleas of Crown, p. 622. note 2. (5) The court erred in refusing to give to the jury the instructions asked by plaintiff. (6) The court erred in computing the time within which the motion for a new trial should have been filed, and in overruling said motion on the ground that the same was not filed within the time allowed by law; and the court of appeals erred in holding that said motion was not filed within the time allowed by law. *Nat. Bank v. Williams*, 46 Mo. 17. (7) The court erred in refusing to grant a new trial on the ground that the defective verdict was not taken advantage of by a motion in arrest of judgment, and the court of appeals erred in holding that a new trial was properly refused, owing to plaintiff's failure to file a motion in arrest of judgment.

Dyer, Lee & Ellis for respondent.

(1) The manifest meaning of the language used by the jury in framing their verdict, is that the plaintiff had no cause of action on the evidence in the case. This is

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equivalent to a verdict against the plaintiff, and to one in favor of the defendant, and although informal is in substance sufficient. *Parmelee v. Smith*, 21 Ill. 620; *Petters v. Bingham*, 10 N. H. 514; *Simmons v. Raiden*, 9 Ga. 543; *McRae v. Calcalough*, 2 Ala. 74; *Jones v. Julian*, 12 Ind. 274; *State, etc., v. Knight*, 46 Mo. 83; *Carter v. Blankenship*, 3 Mo. 583; *Longacre v. State*, 2 How. [Miss.] 637; 2 Hilliard on New Trials, 133; *Schaabs v. Wheel Co.*, 56 Mo. 173; *Edwardson v. Garnhart*, 56 Mo. 81. (2) The objection to the form of the verdict can only be raised by motion in arrest of judgment, and not by motion for a new trial. *Erdbruegger v. Meier*, 14 Mo. App. 258; *Finney v. State*, 9 Mo. 225. (3) The instructions given fully presented all the law there was in the case, and more favorably than plaintiff was entitled to.

NORTON, J.—This is an action for libel, in which the defendant is charged with publishing certain libelous statements, particularly set forth in the petition. The answer admitted the publication of the statements charged in the petition as libelous, and by way of justification, alleged the statements so published to be true. The jury to which the cause was submitted returned into court the following verdict, to-wit: "We, the jury, in the case of *David A. Cattell v. The Dispatch Publishing Company*, find no cause for action. F. W. Weber, Foreman." The foreman of the jury handed this verdict to the court, who after examining it, suggested to the foreman that the verdict should be in the following form: "We, the jury, find for the defendant." To which the foreman replied that the jury had agreed on the particular form of verdict returned and did not wish to change the same. Whereupon the jury were asked by the clerk, after reading the verdict to them, if the verdict was their verdict, to which all replied in the affirmative, and the said verdict was received and filed, and judgment was rendered thereon in favor of defendant. This judgment was affirmed on appeal to the St. Louis court of appeals.

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It is evident that the verdict of the jury is informal and unsatisfactory, and is not directly responsive to the issues submitted to them, and the conclusion that they intended by it to find for the defendant can only be reached by a process of reasoning. While, if the verdict had been received by the court, without directing the attention of the jury to its formal insufficiency, and suggesting that the verdict should be, "We, the jury, find for the defendant," we would be inclined to hold that it would support a judgment rendered thereon in favor of defendant, yet we are of opinion that the verdict ought not to have been received when the fact is considered that when the attention of the jury was called to its insufficiency, and it was suggested that it be made to conform to the interpretation which the court put upon it, namely, that the finding was in fact for defendant, the jury through their foreman declined to make the change, saying they had agreed on the particular form of verdict as returned, thereby indicating that it was not their intention to find for defendant, and that they were unwilling for it so to appear in their verdict. It amounted to a refusal on the part of the jury to return a verdict for defendant. Under these circumstances it was the duty of the court to direct the jury to retire and consider further of their verdict, under instructions that if they found for plaintiff, their verdict should be in the following form: "We, the jury, find for plaintiff and assess his damages at ——— sum," filling the blank with such amount of damages; and that if they found for defendant then their verdict should be: "We, the jury, find for the defendant."

The court may direct the jury to amend, when the verdict is imperfect and informal, and may send them back to the jury room for that purpose. In every case of a verdict rendered the judge should look after its form and substance so as to prevent a doubtful or insuffi-

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cient finding from passing into the records of the court. Proffatt on Jury Trials, secs. 457-459.

It appears that the motion for new trial was filed on the fifth day after the verdict was rendered. Inasmuch as one of these five days was Sunday, the motion was filed in time, it having been held by this court in the case of *National Bank v. Williams*, 46 Mo. 17, that as to matters to be transacted in court, Sunday is *non dies*, and should not be counted. In moving for a new trial, or in arrest, the party is entitled to four working days, if the term shall so long continue.

The judgment of the court of appeals will be reversed and the cause remanded to that court with directions to reverse the judgment of the circuit court and remand the cause for new trial. All concur.

HOKE, *Appellant*, v. THE ST. LOUIS, KEOKUK & NORTHERN RAILWAY COMPANY.

1. **Negligence: RAILROAD: VICE-PRINCIPAL.** Where a road master of a railroad, having general superintendence of its track, while engaged in superintending and directing the removal of a wrecked train, but not in the manual work of removing a wreck, gives a wrong signal to the engineer of a train assisting in removing the wreck, whereby a laborer engaged in the work of removal is injured, the railroad is liable therefor. (Following *Moore v. Railroad*, 85 Mo. 588).
2. **Fellow Servant: VICE-PRINCIPAL.** The road master was not a fellow servant of the one injured in the transaction in which the injury was received, but represented the company therein as vice-principal, or *alter ego*, and his negligence in the matter causing the injury was that of the company.

Appeal from St. Louis Court of Appeals.

REVERSED.

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N. C. Dryden and *A. R. Taylor* for appellant.

(1) The facts in evidence sustain the verdict. The plaintiff's injuries were directly caused by the negligence of John Tracy whilst engaged in directing and controlling the business of the defendant, or a department thereof, and the defendant is, therefore, liable. *Brothers v. Carter*, 52 Mo. 372; *Gormly v. Vulcan Co.*, 61 Mo. 492; *McGowan v. Railroad*, 61 Mo. 532; *Dowling v. Allen*, 74 Mo. 13; *Malone v. Hathaway*, 64 N. Y. 9. (2) Nor does it make any difference as to defendant's liability that the negligence of the agent that occasioned the injury *was the personal conduct of the agent*. Even if the master (or the vice-principal) at the time of committing the act of negligence be working with the injured servant, still they are not fellow servants, and the master is liable. *Ashwith v. Stanwix*, 3 El. & El. 701; *Gormly v. Vulcan Works*, 61 Mo. 495; *McGowan v. Railroad*, 61 Mo. 528; *Shearman & Redf. on Neg.*, sec. 102. (3) The petition is good, it sets forth that the injury was caused by the negligence of defendant's agent. (4) The verdict should not be disturbed as being excessive. *Frick v. Railroad*, 75 Mo. 592.

Fagg & Hatch and *T. F. McDearmon* for respondent.

(1) The petition did not state a cause of action, because it shows that John Tracy and Michael Fitzgerald, whose negligence, it is averred, occasioned the injury to appellant, and appellant were at the time all employes of respondent, engaged in a common employment of loading a wrecked car on to a wrecking train, and makes only the general averment, that said Tracy was one of the controlling officers of defendant's said railroad, to-wit. the road master, without any statement of facts showing that the duties and authority of such road master were

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such as to make him a vice-principal or *alter ego* of the appellant. 2 Thompson on Neg., 1026, 1028 and 1050; Wood on M. & S., 809; *McGowan v. Railroad*, 61 Mo. 528; *Scott v. Robards*, 67 Mo. 289; *Harper v. Railroad*, 47 Mo. 567; *Waldhier v. Railroad*, 71 Mo. 514; *Lawler v. Railroad*, 62 Me. 463; *Leduke v. Railroad*, 4 Mo. App. 485. (2) The court should have sustained defendant's demurrer to the evidence. *Nolan v. Shickle*, 3 Mo. App. 300; *Smith v. Harkness*, 3 Mo. App. 585; *Lindsay v. Mfg. Co.*, 4 Mo. App. 570. (3) The court committed error in giving plaintiff's first instruction. *Cooper v. Ord*, 60 Mo. 420; *Summer v. McCray*, 60 Mo. 493; *Wells v. Halpin*, 59 Mo. 92; *Brothers v. Carter*, 52 Mo. 372. (4) Plaintiff's instruction number three was wrong, for it makes the liability of defendant rest entirely upon the negligence of a "superior" co-employee, without defining the authority of such employee, or how or by whom the defendant could be guilty of negligence. *Marshall v. Schricker*, 63 Mo. 372; *Brothers v. Carter*, 52 Mo. 372; *McGowan v. Railroad*, 61 Mo. 528; *Harper v. Railroad*, 47 Mo. 567. (5) Instruction number nine, given by the court on its own motion, was erroneous. *Goetz v. Railroad*, 50 Mo. 473; *Henschen v. O'Bannon*, 56 Mo. 289. (6) Instructions number five, six, seven and eight, offered by respondent, should have been given, for they correctly declared the law, viz.: that before liability can be fixed on defendant, the testimony must prove that at the time of the negligence complained of, the servant whose negligence caused the injury must have been in discharge of some absolute or implied duty which the master owed to the servant, and the injury complained of must have resulted from the negligent discharge of such duty. *Daubert v. Pickel et al.*, 4 Mo. App. 590; *Murphy v. Railroad*, 4 Mo. App. 565; *Rains v. Railroad*, 71 Mo. 164; *Marshall v. Schricker*, 63 Mo. 308; *Gormley v. Vulcan Iron Works*, 61 Mo. 492; *Crispin v. Babbitt*, 81 N. Y. 520; *McCasker v. Railroad*, 84 N. Y. 77; *Lee v.*

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Detroit Bridge Co., 62 Mo. 565; *McGowan v. Railroad*, 61 Mo. 528; *Gibson v. Railroad*, 46 Mo. 163; *Rohback v. Railroad*, 43 Mo. 187; *McDermott v. Railroad*, 30 Mo. 115; *Lawler v. Railroad*, 62 Me. 463; *Blake v. Railroad*, 70 Me. 60.

RAY, J.—This was an action for damages for an injury alleged to have been done to plaintiff by defendant and its employes while engaged in loading a wrecked car upon a wrecking train of defendant. The action was commenced in the Lincoln circuit court, and afterwards transferred to that of St. Charles, where there was a verdict and judgment for plaintiff for ten thousand dollars, from which the defendant appealed to the St. Louis court of appeals, where the judgment of the circuit court was reversed and the cause remanded, from which the plaintiff appealed to this court.

The case is reported in 11 Mo. App. 574, where the general facts of the case appear, except that the record shows the extent and nature of the powers, duties, and jurisdiction of Tracy, as road master of defendant, more fully than appears by the opinion. The controlling question in the case, and upon which it was made to turn in the court of appeals, is whether the plaintiff and said Tracy were fellow servants in the transaction in which the injury was received, or whether said Tracy in said transaction acted as vice principal or *alter ego* of the defendant company. The court of appeals in effect held that the plaintiff and said Tracy were fellow servants, and that it did not appear that the injury complained of arose from any negligence of Tracy's in the matter of employing hands, or in any matter in which he replaced the master, or in any of the business in which he was vice-principal or *alter ego* of the master, and that plaintiff could not, therefore, recover, and for that reason reversed the judgment of the trial court and remanded the cause, and the propriety of this ruling is now the

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question before us. The record shows not only that said Tracy was road master of defendant's road, with power to employ and discharge hands, but, also, that as such road master he had jurisdiction over the road bed and track of defendant throughout its entire line; that his duties were to keep road bed, track, cattle guards, and fencing, in repair; that he had authority to employ and discharge section foremen, foremen of construction and wrecking trains, bridge watchmen, and, also, all men and laborers in his department; that his authority and jurisdiction extended alike to laborers, section foremen, foremen of construction or wrecking trains engaged in the work of clearing away or removing a wreck from the road bed or track, or any special foreman engaged in the special work of clearing away such a wreck.

The record also shows that in August, 1879, a supply train of defendant's cars, consisting of three box and three flat cars, had been wrecked on defendant's road, near Foley station, and the evidence on the part of the plaintiff tended to show that the plaintiff at the time of the injury complained of was working in defendant's employ as a laborer under Michael Fitzgerald, an agent and servant of defendant, who was superintending, or bossing, the body of laborers, of whom the plaintiff was one; that plaintiff was acting as a laborer under the direct supervision, direction, and control, of John Tracy, who was defendant's road master, and as such had control of the road bed and track of defendant's entire line, with the powers, duties and jurisdiction heretofore stated in that behalf; that said Fitzgerald was section and construction foreman of defendant, and was assisting said "Tracy in superintending plaintiff and other laborers in removing the wreck and loading a flat car," whose wheels and trucks had been broken off, upon a wrecking train, both of which were owned by defendant, and being controlled by defendant's agents. The wrecking train was composed of an engine and flat cars, and

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had been cut in two, some of the cars attached to the engine being south of the wrecked flat car, and other cars standing still north of the wrecked car. The flat, or wrecked, car had been lifted upon the track of defendant's road when the train was cut in two and the north end of the wrecked car had been lifted up and placed on the first car in the wrecking train north of the wrecked car, and the other laborers and plaintiff, under the control and supervision of Tracy and Fitzgerald, were attempting to place the south end of the wrecked car on the first car of the wrecking train, immediately south of the wrecked car, so that the first car on the south might be pushed under the wrecked car. This wrecked car was held up above the level of the first flat car south by levers resting on the floor of the first flat car south, the north ends of which levers extending a few inches under the south end of the wrecked car, and while the wrecked car was held up by the levers plaintiff was ordered by Fitzgerald and Tracy to go under the wrecked car and push out one of the levers. Plaintiff obeyed the order, and whilst pushing at the lever, Tracy, intending to signal the engineer to move the engine north and thus force the flat car on which the levers were resting under the wrecked car, by carelessness and mistake signaled the engineer to move south, in consequence of which the engine was moved south and thereby drew the flat car and levers from under the wrecked car and caused the same to fall on plaintiff, crushing and crippling him for life. The testimony on the part of the defendant, on the contrary, tended to show that Tracy gave the right signal, but that the engineer, by mistake and carelessness, moved the engine south instead of north, thus causing the accident. On this point the testimony is conflicting as to what signal Tracy gave, but all agree that if he gave the signal the plaintiff's witnesses say he gave, he gave the wrong signal, caused the cars to move the wrong way, and thus occasioned the accident and injury in question, and so the jury found.

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The material instructions given and refused in the cause are set out in the opinion of the court of appeals, and are as follows :

“Those given for the plaintiff are two in number, as follows :

“1. If the jury find, from the evidence, that one John Tracy was the road master of defendant's railroad, and as such road master was the superintendent for the defendant of the work of removing and loading up the wreck in question, and had entire control and charge thereof, with power to employ the section foreman and section hands, and that the plaintiff was subject to his orders and directions, then the jury are instructed that said Tracy was not a fellow servant with the plaintiff, and that said Tracy's acts and conduct in connection with said work were, and are, the acts and conduct of the defendant, so far as this case is concerned.

“2. If the jury believe, from the evidence, that the plaintiff, while employed by defendant as a section hand, on or about the fifteenth day of August, 1879, in the discharge of his duty as such section hand, was ordered by his superior to step under the wrecked car and push out a certain lever, and that in the discharge of said duty, and in obedience to said order, plaintiff stepped under said car, and while engaged in attempting to carry out said order, the defendant, through negligence or mistake, and without warning to plaintiff, gave to the person in charge of the engine, a signal to move said engine and the cars attached to it southward, when the proper signal would have been to move the engine and the cars attached to it northward, and that in obedience to said signal the person in charge of the engine moved said engine and cars attached to it, southward, and that in consequence thereof said wrecked car fell upon and injured the plaintiff, the verdict must be for the plaintiff.

“To the giving of which instructions by the court, the defendant at the time excepted.

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“Three were given for the defendant, as follows:

“1. If the jurors believe, from the evidence, that at the time the plaintiff was injured, he was an employe of the defendant, and engaged with a number of other men in loading a wrecked train on a flat car, attached to an engine on defendant's track, and that John Tracy, defendant's road master, gave a signal to the engineer in charge of the engine, to move his engine northward, and that the engineer, instead of moving his engine northward, moved southwardly, and that the plaintiff's injury was caused by the southward movement of the engine and the cars thereto attached, the plaintiff cannot recover, and they must find for the defendant.

“2. Even though the jury may believe, from the evidence, that plaintiff's injury was caused by the southward movement of the train by the engineer in charge, in obedience to an order of John Tracy, defendant's road master, so to do; yet, if they also believe, from the evidence, that said engineer had reasonable grounds to believe that this was a wrong signal, and that obedience to the signal would cause damage or injury, the plaintiff cannot recover, and the finding must be for the defendant.

“3. If the jury believe, from the evidence, that prior to the happening of the accident which caused the injury to plaintiff, defendant's road master, John Tracy, gave the men employed in loading the wrecked car on another flat car warning that they must get out of the way, that he was going to move the train, or words to that effect, and that said warning was given in sufficient time, before the movement of said train, for said men to get out of the way, and loud enough for the men to hear said warning; and shall further believe that plaintiff, in the exercise of reasonable care, could have heard said warning, and failed to get out of the way, then the defendant is not liable in this action, and the verdict should be for the defendant, unless the jury further find that

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said Tracy saw the plaintiff was in danger in time to have prevented the injury, and failed to make proper precautions to prevent said injury.

"The court gave the following instruction upon its own motion :

"9. The court instructs the jury that a servant of a corporation who is injured by the misconduct or negligence of his fellow servant, can maintain no action against the master for such injury, and that this rule applies in all cases, without regard to the degree of subordination in which the different servants or agents may be placed with reference to each other, and if the jury find, from the evidence, that plaintiff, Tracy and Fitzgerald, were, at the time of the injury complained of, all employes of defendant, in the service of the defendant, then the verdict of the jury must be for defendant, unless the jury should also find and believe, from the evidence, that the road master, Tracy, had sole charge and control of the work as superintendent thereof, with power to employ the hands employed, and that the plaintiff was, at the time, subject to his order, and that the injury complained of was caused by his (the said Tracy's) negligence.

"Defendants asked the court to instruct the jury, 'that if plaintiff, and Tracy and Fitzgerald, were fellow servants of defendant, all engaged at a common employment at the time of the accident, and the injury was caused by Tracy's negligence in giving a wrong signal, defendant is not liable;' and, also, 'that if Tracy was road master of defendant, with authority to employ and discharge hands, yet, unless plaintiff was injured by some negligence of Tracy in the employment of unfit men, or the providing of unsafe appliances, the verdict must be for defendant.'

"These declarations of law were refused."

The court of appeals held that instruction number two, given for plaintiff, was erroneous and unwarranted by

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any evidence in the case, and that the instructions asked by the defendant and set out in the course of its opinion, as refused, should have been given. The case at bar, in all its essential features and principles, is identical with that of *Moore v. The Wabash, St. Louis & Pacific Railway Co.*, 85 Mo. 588. In that case this court, per Henry, C. J., had occasion to consider and review this whole question of fellow servants in an elaborate opinion, and the ruling in that case must be accepted as decisive of this. That was an action to recover damages for an injury sustained by the plaintiff therein, while in the employ of that defendant as a car repairer. The defendant in that case, it seems, kept a local car shop at Stansbury (its general car shops being elsewhere and under a general superintendent thereof, named Buck), and had in its employ a foreman of car repairers, named Kesler, who had sole charge and control of hands employed to repair cars. At that shop the plaintiff was employed as a car repairer, and was ordered by said foreman to repair the drawhead of one of the freight cars of defendant standing on a side track, under a promise from said foreman that he would protect him from danger and injury while so employed in making said repairs, and prevent any train or engine from coming on said side track while so employed, but that through the negligence and carelessness of said foreman, an engine of defendant was permitted to come in upon said side track and drive with great force against said car under which said plaintiff was so at work, whereby plaintiff's right arm was caught and crushed between said cars, etc. In treating of that case the court use this language: "If we may venture a general proposition on the subject, it is that all are fellow servants who are engaged in the prosecution of the same common work, under the direction and management of the master himself, or of some servant, placed by the master over them. If a person employ another

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to perform a duty which he would have to discharge if another were not employed to do it for him, such person as to that service stands in the master's stead with relation to other persons. * * * The person who had control of the work and the men engaged in it directing how, when and where it should be done, represented in those matters the company itself. It was the duty, a contractual obligation of the company, to provide for the safety of the men at work in repairing the cars. The company devolved that duty upon the person who represented it in conducting, ordering and managing the work and men engaged in it. * * * The foreman, in what he had to do for the company, did not represent himself. Except as the agent of the company, he had no interest in the repairs ordered. He did none of the manual labor in repairing the car, but for the company gave such orders and directions to the car repairers as he thought proper. That the foreman was an inferior servant to Buck (who had a general control and management of car repairs anywhere along the line of the road) does not determine that the foreman was a fellow servant of plaintiff. * * * Buck, the general superintendent of car repairs, was not a fellow servant of plaintiff, and could not have been so regarded, if he, instead of Kestler, had been present and given the order and made the alleged promise to protect plaintiff in obeying that order, and if, by authority of the company, Kestler was placed there to do what fell within the line of Buck's duty, did he not in respect to that matter stand in the same relation to the company as Buck himself, and if Buck had personally done what it is alleged Kestler did, could the company have successfully defended the action on the ground that Buck and plaintiff were fellow servants? We recognize the principle that one may act in the dual character of a representative of a master and as a fellow servant. If it had been the duty of the foreman in this case to assist when necessary in the manual work of repairing the car, in addition to the other duties of super-

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intending, controlling, and directing such work, and he had gone under the car with plaintiff to assist in repairing the car, and by some negligent or unskillful act, while so engaged, injured the plaintiff, the latter could not have recovered without proof of facts which entitle one to recover when injured in consequence of the negligence or unskillfulness of a fellow servant. Under the circumstances proved in this case, we think that plaintiff and Kestler were not fellow servants."

In the case at bar, as has been seen, Tracy, whose negligence and carelessness in giving signals to the engineer occasioned the injury in question, was not at the time engaged or assisting in the manual work of removing said wreck from the road bed and track of defendant, or in loading said wrecked car upon said wrecking train, nor does it appear to have been his duty, as road master, so to do, but was engaged as such in superintending, directing and controlling said laborers, including plaintiff, in said work, and in that particular was in the line of his duty as road master of defendant, and under the authority of said case of *Moore v. Wabash, St. Louis & Pacific Railway Co.*, *supra*, said Tracy and plaintiff were not fellow servants, but that Tracy, in the transaction in which the injury in question was received, represented the master, and in that behalf was acting as vice-principal, or *alter ego*, and that his negligence, in that particular, was the negligence of the defendant, for which it is liable. Various other questions were raised in the progress of the trial, and suggested and argued in briefs of counsel, which we have not overlooked, but we have not deemed them material to the proper disposition of the case and will not be further noticed.

The question we have considered was raised at every stage of the proceeding: First, by way of objection to the reception of any evidence at the trial; second, by way of demurrer to plaintiff's evidence; and third, by way of instruction; and manifestly was, and is, the principal and controlling question in the cause.

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For these reasons the court of appeals erred in its said rulings, and its said judgment for that cause is reversed and the cause remanded to that court with directions to enter up its judgment affirming that of the circuit court. All concur.

THE FOURTH NATIONAL BANK OF ST. LOUIS V. NOONAN,
Appellant.

1. **Debt : PARTIAL ASSIGNMENT OF BY CREDITOR.** A creditor cannot without the debtor's consent assign a part of a note or other debt.
2. ———: **WAIVER.** The debtor may, however, waive his right to object to such partial assignment.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Boyle, Adams & McKeighan for appellant.

(1) The paper of April 6, 1880, executed and delivered by the respondent to William J. Berkley, vested in him the title to the note sued on, and gave him the right to sue upon it in his own name as the holder thereof. Any other construction of it renders it nugatory and void, an interpretation which the court will hesitate to put upon any instrument. The court will rather seek the intention of the parties, and take that view of the transaction which will best serve the purpose which the parties had in view. A note may be assigned on a piece of paper separate from that on which the note is written. *McGee v. Ridderbarger*, 39 Mo. 365; *Ford v. Angelrodt*, 37 Mo. 50. No particular form of words is necessary to an assignment. It may be quite sufficient to transfer the

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property, although the word assign should not be used, and the assignment may be inferred from the words used.

Weed v. Jewett, 2 Metcalf, 608; *Gerrish v. Sweetser*, 4 Pickering, 374. An assignment may be effected by a power of attorney to collect the money and distribute it. *Watson v. Bagaley*, 12 Pa. St. 164. Whatever may be the inaccuracy of expression, or the inaptness of the words used in an instrument in a legal view, if the intention to pass the legal title to property can be clearly discovered, the court will give effect to it, and construe the words accordingly. *Tiernan v. Jackson*, 5 Peters, 580. If the paper in question worked an assignment of the note then the respondent could not sue upon it. *Long v. Heinrich*, 46 Mo. 603. (2) The judgment before the justice of the peace amounted to a voluntary credit on the whole note of all in excess of two hundred and fifty dollars, and the note so reduced by such credit was taken up into the judgment, and ceased to longer have any valid existence as a subsisting liability against the appellant, and this is true whether the assignment to Berkley was of the whole or only part of the note. No demand included in a plaintiff's complaint, or in a defendant's set-off or counter-claim, can be allowed in a suit if at any time before its allowance it has been taken into account in forming a judgment in another action between the same parties. Freeman on Judgments, sec. 224; *Andrews v. Varrell*, 46 N. H. 17; *McGildroy v. Aubry*, 30 Vermont 538; *Bank of North America v. Wheeler*, 28 Conn. 433. A judgment concludes the rights of the parties whether it includes the whole or only a part of the demand. *Union R. R. Co. v. Traube*, 59 Mo. 355; *Flaherty v. Taylor*, 35 Mo. 447; Freeman on Judgments, sec. 240; Bigelow on Estoppel, 117. (3) The respondent is estopped from denying the right of Berkley to enforce the note against appellant in his own name. *Prickard v. Sears*, 6 Ad. & E. 469; *Rice v. Groffman*, 56 Mo. 434; *Taylor v. Sangrain*, 1 Mo. App. 312. If the instrument of

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assignment should be held to be in the nature of a power of attorney coupled with an interest, then it is irrevocable. *Hunt v. Roumanier*, 8 Wheat. 174; *Hartley's Appeal*, 53 Pa. St. 212; *Hutchens v. Hubbard*, 34 N. Y. 24. If Berkley under the paper of April 6, 1880, was made merely an agent for collection, then he could sue in his own name on the note. *Webb v. Morgan*, 14 Mo. 428; *Beattie v. Lett*, 28 Mo. 596; *Simons v. Belt*, 35 Mo. 461.

G. A. Finkenburg for respondent.

(1) The instrument executed by plaintiff to Berkley is not an assignment. It is a contingent transfer of an interest in a future fund which may or may not come into actual existence. *Spain v. Hamilton*, 1 Wall. 604; *Green v. Ashley*, 6 Leigh, 135; *Ford v. Garner*, 15 Ind. 298. (2) A note cannot be assigned in part so as to enable the partial assignee to maintain an action on the same against the maker. *Edwards on B. & N.*, 279; 1 *Daniel on Neg. Paper*, sec. 668; *Frank v. Kaigler*, 36 Tex. 305. (3) The attempted assignment was simply void as against the maker, and conferred no rights on the partial assignee as against him. The right to control and recover the whole demand remained in the assignor, and the defendant in the case at bar had a complete defence against the partial assignee. *Manderille v. Welch*, 5 Wheaton, 277; *Love v. Fairfield*, 13 Mo. 300; *Burnett v. Crandall*, 63 Mo. 410; *Beardslee v. Morgner*, 73 Mo. 22. And this is particularly so in cases of bills and notes. *Lyon v. Lyon*, 4 Bibb. 438; *Loomis v. Robinson*, 76 Mo. 488; *Elledge v. Straughn*, 2 B. Monroe, 81; *Bank v. Trimble*, 6 B. Monroe, 599; *Fairgrieves v. Lehigh Co.*, 5 Am. L. Reg. (O. S.) 161; *Frank v. Kaigler*, 36 Texas, 305. A partial assignee cannot recover on his fractional interest, without making his assignor a party. *Smith v. Gary*, 2 Devereux &

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Battie, 42, 50. (4) If, however, the debtor chooses to waive his right to resist the division of an entire demand, he may do so, and having done so, he is thereafter estopped from complaining. *Burnett v. Crandall*, 63 Mo. 410; *Lett v. Morris*, 4 Simons, 607. Much less can he, by submitting to a judgment for a part, rid himself of his entire liability for the remainder. *Cook v. Ins. Co.*, 8 Howard, 514. (5) The doctrine that when a party splits up his cause of action, and recovers a part, he is barred as to the remainder applies only to cases where the same person is plaintiff in different suits brought to enforce a single demand. (6) The trial court erred in admitting the proceedings and judgment in the suit of *Noonan v. Berkley* in evidence against this defendant. A judgment in a prior suit is admissible only against a person who was a party thereto, or against some one who claims under a party to the record. Privity in estate is based on succession; one who succeeds to another's title may, under circumstances, be bound by judgment against his predecessor, but the predecessor is never bound by judgment against his successor, unless he had an obligation to defend the suit, was duly notified, and had a reasonable opportunity to do so. 2 Phillip's Evidence, 6; Bigelow on Estoppel, 95; Freeman on Judgments, sec. 162; 2 Smith's Lead. Cas., 627 and 800; *Hunt v. Haven*, 52 N. H. 162; *Mackey v. Coates*, 70 Penn. Stat. 350. See this doctrine applied to the relation of assignor and assignee. *McDonald v. Gregory*, 41 Iowa, 513; *Brown v. Brown*, 2 E. D. Smith, 153; *Baring v. Fanning*, 1 Paine, 549; *Bertrand v. Bingham*, 13 Texas, 266; *Maupin v. Compton*, 3 Bibb. 214. Judgment rendered after suit commenced cannot be pleaded in bar. *State v. Spikes*, 33 Ark. 801, 810.

BLACK, J.—This suit is based upon a note made by the defendant dated April 30, 1877, maturing June 24, 1877 for twenty-four thousand dollars and payable to plaintiff.

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The petition gives credits for proceeds of certain collaterals and demands judgment for some nine or ten thousand dollars. The suit was begun in 1882 and the cause came on for trial March 20, 1883, when the defendant filed a second amended answer. The third and fourth defences, set up for the first time in this amended answer, are based upon the following facts as disclosed at the trial. Noonan, the defendant here, sued Berkley before a justice of the peace, and on the return day of the writ, which was the day before the present suit came on for trial, Berkley appeared before the justice and filed an off-set and judgment was at once entered for Berkley against Noonan for fifty dollars, being the excess of his demand after having remitted enough of the off-set to bring it within the jurisdiction of the justice. The document filed by Berkley as an off-set was signed by plaintiff's president and is as follows :

“ST. LOUIS, April 6, 1880.

“In consideration of two hundred and fifty dollars, in hand paid by William J. Berkley, we do hereby assign and transfer to him five hundred dollars out of any proceeds he may collect from T. S. Noonan on his note dated April 30, 1877, for the sum of twenty-four thousand dollars due five days after notice, now held by us. But this agreement shall not apply to any proceeds realized on collaterals pledged to secure said note ; the right to realize on said collaterals being reserved to us exclusively.

“JOHN C. H. D. BLOCK, Pres.”

1. The contention that this paper operated as an assignment of the whole note cannot be maintained. It does not purport to transfer the note, or even the whole of the proceeds. The contrary intention is clearly expressed. The only doubt that can be entertained is whether it assigns a part of the note, or only a part of the proceeds when collected, leaving the title to the whole note as well as the possession with the bank.

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Taking the paper as a whole we think it should be regarded as an assignment of five hundred dollars, a part of the note. This is certainly the most favorable view to the defendant. Now it has been held several times in this state that a judgment creditor cannot assign a part of the judgment, so as to be binding upon the debtor without his consent. The debtor has a right to pay the debt as a whole. He may settle with the creditor though he has notice of the assignment. As to him such partial assignment is invalid. *Love v. Fairfield*, 13 Mo. 301; *Burnett v. Crandall*, 63 Mo. 410; *Loomis v. Robinson*, 76 Mo. 488. The same is true with respect to a note or other entire debt. *Beardslee v. Morgner*, 73 Mo. 23. These cases all proceed upon the theory that the debtor does not consent to the division of the debt, or to the payment of it in parcels. If he sees fit, he may waive his right to resist payment in fractions. He may consent to the partial assignment, and if he does he ought not to be heard to complain. The statement of the off-set filed with the justice to which this assignment was attached only claimed an interest of five hundred dollars in the note sued upon in this case. The defendant here not only failed to resist the off-set, but appeared and acknowledged it to be correct. He must be taken to have given his assent to the partial assignment. By the operation he paid four hundred and fifty dollars with a demand of two hundred dollars, and now seeks to avoid on the same ground the payment of nine or ten thousand dollars. This he should not be permitted to do.

The judgment of the court of appeals, reversing that of the circuit court, is affirmed. All concur.

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GORDON *et al.*, Appellants, v. LEWIS.

1. **Mortgage: ADVERSE POSSESSION BY MORTGAGEE: LIMITATIONS.** A mortgagee in possession, who for the period of limitation refuses to recognize the existence of the mortgage or any equitable claim in the mortgageor, may stand upon such adverse claim and invoke the statute against the right of redemption.
2. **Statute of Limitations: TACKING DISABILITIES.** There can be no tacking of disabilities to escape the bar of the statute of limitations.
3. ———: ———. Where a cause of action accrues to a woman under the disability of coverture, the statute of limitations will begin to run immediately upon her death against her children, notwithstanding their minority.

Appeal from Adair Circuit Court. — HON. ANDREW ELLISON, Judge.

AFFIRMED.

P. F. Greenwood for appellant.

(1) Mrs. Gordon, being a married woman, had she lived her suit could have been brought at any time within twenty-four years from July 27, 1863; the time given her not having elapsed at the time of her death, her heirs had until the expiration of said twenty-four years to bring suit. *Dyer v. Brannock*, 66 Mo. 391; *Dyer v. Wittler*, 14 Mo. App. 52; R. S., 1879, secs. 3222-4. (2) Upon the death of Mrs. Gordon the life estate of James E. Gordon was consummate, and when this occurred the statute of limitations had not run against these appellants. (3) There is no statute of limitations against the foreclosure of a mortgage, and hence none against a suit to redeem. *McNair v. Lot*, 34 Mo. 285.

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John C. O'Ferrall for respondent.

(1) Limitation began to run against Mrs. Gordon in her lifetime, and so beginning it did not cease at her death. *Rogers v. Brown*, 61 Mo. 187. (2) The coverture on part of the mortgageor (Mrs. Gordon standing in the shoes of the mortgageor in this case), will not prevent limitation from running on the right to redeem. Jones on Mortgages [3 Ed.] sec. 1150; *Hartford v. Fitch*, 41 Conn. 486. (3) Equity will apply to actions to redeem; the same period which the law allows for actions in ejectment; as limitations on the equity of redemption are analogous to the statutory limitation for the bringing of an action to recover real estate. *Johnson v. Johnson*, 81 Mo. 331-335; *McNair v. Lot*, 25 Mo. 182-190; *Same v. Same*, 34 Mo. 285; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90-96; Jones on Mortgages, secs. 1144 and 1192. (4) The right to redeem this mortgage accrued, at least, when defendant began his adverse claim in 1863, which was during the life of Mrs. Gordon. Successive disabilities will not be permitted, and the heirs cannot tack to their mother's coverture. The limitation beginning to run in the lifetime of Mrs. Gordon continues against these plaintiffs, notwithstanding their disability at time of descent cast. Jones on Mortgages [3 Ed.] sec. 1151; *Rogers v. Brown*, 61 Mo. 187. Cumulative disabilities are not allowed. Angell on Limitations, secs. 196, 197, 477, 482; *Billon et al. v. Larimore et al.*, 37 Mo. 375; *Dessaunier v. Murphy*, 33 Mo. 184; *Mitchell v. Berry*, 1 Met. [Ky.] 602. The disability of children cannot be added to that of the mother. *Mitchell v. Berry*, 1 Met. [Ky.] 602, 616. (5) The right to redeem and the right to foreclose are reciprocal rights. When one is barred the other is likewise. Jones on Mortgages [3 Ed.] sec. 1146. (6) After the lapse of limitation the *onus* is on the mortgageor to show that the effect of mortgagee's possession

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was not adverse. Jones on Mortgages [3 Ed.] sec. 1157; *Dessaunier v. Murphy*, 33 Mo. 184.

NORTON, J.—This suit was commenced in the Adair county circuit court on the twenty-eighth day of July, 1881, by plaintiffs as the heirs of Emalia Gordon to redeem a mortgage executed by James Sevy on the fourth of January, 1858, conveying to Adair county the south half of the southeast quarter of section thirteen, township sixty-two, range fifteen, to secure the payment of a certain bond within mentioned for the sum of two hundred dollars. On the trial judgment was rendered for the defendant, from which plaintiffs have appealed.

It appears from the record that Sevy entered the above described land in 1854, and mortgaged the same to Adair county in 1858; that in 1860, Emalia Gordon, the mother of plaintiffs, by various mesne conveyances made subsequently to the said mortgage, became the owner of said land subject to said mortgage executed by Sevy to the county; that in 1860 said Emalia and her husband, James E. Gordon, took possession of said land, and the said James E. made a payment of interest on the bond to the county. It further appears, that in 1863 the land was sold by the sheriff, by order of the county court of Adair county, for the payment of the bond secured to be paid by the mortgage; at which sale the county purchased, and subsequently, in July, 1863, conveyed the land by a commissioner's deed to one Epperly and defendant Lewis for \$272.28, which was applied to the payment of the mortgage debt. It also appears that said Epperly conveyed his interest to defendant Lewis. It also appears that after this sale, the said Emalia Gordon and her husband abandoned the premises in 1863, and moved off the same, and that defendant Lewis immediately entered and took the actual possession of the land, claiming it adversely to all the world, and has lived on it under such claim ever since. It also appears that said

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Emalia Gordon died in 1864, and that her husband, James E., who survived, conveyed, a short time before this suit was brought, whatever interest he had in said land to plaintiffs.

The question raised by the above state of facts is whether the right of redemption is barred by the statute of limitations. The trial court held that it was and we think properly. The fact that the suit is a proceeding in equity can make no difference as to the operation of the statute of limitations; it having been held in the case of *Kelly v. Hurt*, 61 Mo., at page 466, that: "The statute of limitations applies to all civil actions—to those which were formerly denominated suits in equity as well as to actions at law." The case of *Rogers v. Brown*, 61 Mo. 187, is to the same effect. In the case of *Cape Girardeau County v. Harbison*, 58 Mo. 90-93, it is said: "That a mortgagee in possession, who, for the period of limitation, refuses to recognize the existence of the mortgage, or any equitable claim in the mortgageor, may stand upon such adverse possession, and under color of the statute resist an effort by the mortgageor to enforce his equity of redemption." In the cases of *Dessaunier v. Murphy*, 33 Mo. 184 and *Billon et al. v. Larimore*, 37 Mo. 375, it is held that when a disability exists at the time the cause of action accrued, when that disability is removed, another disability cannot be tacked on to it. In the first case cited the wife was under disability of coverture when the cause of action accrued. She died leaving her husband living, and it was held, "that immediately upon her death the statute began to run against her representatives without regard to any disabilities under which they might be, for this would in effect be a cumulation of disabilities."

Applying the principles enunciated in the cases cited and it is clear that the plaintiffs are barred in this action. The adverse possession of defendant began in 1863, and has been continued ever since. The cause of action ac-

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crued to Emalia Gordon, the mother of plaintiffs, in 1863. She died in 1864, and upon her death the statute immediately began to run against plaintiffs, notwithstanding their minority, and this suit was not begun till 1881, seventeen years after the statute began to run. The judgment is for the right party and we affirm it. All concur.

ZIEKEL, Appellant, v. DOUGLASS et al.

1. **Conveyance in Fraud of Creditors: SPECIAL DEFENCE, WAIVER OF.** The objection in an action to set aside a deed because made in fraud of creditors, that the defence that the land conveyed was a homestead of the debtor was not specially pleaded, is waived unless made when the evidence was offered.
2. ———: **EVIDENCE.** Stronger evidence is required of a fraudulent intent on the part of a debtor who has conveyed property as against subsequent creditors, than when the debtor was in failing circumstances and the creditors were existing ones.

Appeal from Caldwell Circuit Court.—HON. JAMES M. DAVIS, Judge.

AFFIRMED.

C. H. Mansur, John C. Cross and C. S. McLaughlin
for appellant.

(1) The defendant, Arnot P. Douglass, although present at the trial, did not testify, which is a strong circumstance against him. *Mabary v. McClurg*, 74 Mo. 575; *Baldwin v. Whitcomb*, 71 Mo. 651; *Cass Co. v. Green*, 66 Mo. 512; *Henderson v. Henderson*, 55 Mo. 559. (2) The evidence showed a case of fraud. (3) The acts and declarations of Arnot Douglass while in possession of the lands conveyed, were admissible in evidence to

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show the true character and purpose of the conveyance. *Potter v. McDowell*, 31 Mo. 74; *Exchange Bank v. Russell*, 50 Mo. 531; *Darrett v. Donnelly*, 38 Mo. 494; *Trotter v. Watson*, 6 Humph. 509; *Cahoon v. Marshall*, 25 Cal. 202; Abbott's Trial Evidence, 740-1. (4) There was no defence of a homestead raised by the pleadings, and it was, therefore, inadmissible on the trial. *Northrup v. Insurance Co.*, 47 Mo. 444. (5) The testimony of Mrs. Arnot Douglass was competent, she being a wife of one of the defendants, but not of the party to the issue in this case. *Exchange Bk. v. Russell*, 50 Mo. 534.

J. Wail and *Wm. Henry* for respondents.

(1) In order to defeat the title of a purchaser from one who conveys lands with a fraudulent intent, the vendee must have notice of such intent or participate in the fraud. *Byrne v. Becker*, 42 Mo. 264; *Chouteau v. Sherman*, 11 Mo. 585; *Henderson v. Henderson*, 55 Mo. 534, 555; *Little v. Eddy*, 14 Mo. 160. (2) A party in failing circumstances has the right to prefer one creditor even to the entire exclusion of others. *Richards v. Levan*, 16 Mo. 596; *Johnson v. McAlister*, 30 Mo. 327. And this necessarily implies the right of such creditor to accept such preference. *Shelley v. Boothe*, 73 Mo. 74. (3) And it is no objection to the validity of a conveyance by a debtor which operates to hinder and delay other creditors, that it was made with the intent on the part of the debtor that it should so operate, and that the creditor receiving it was aware of that intent, provided he received it with the honest purpose of securing his own debt. *Shelley v. Boothe*, 73 Mo. 74; *Forrester v. Morse*, 71 Mo. 652-9; *Dunley v. Danforth*, 61 N. Y. 626. (4) And the declarations made by the debtor after he executes the conveyance, cannot be allowed to affect the rights of the grantee. *Gutzweiler's adm'r v. Lackman*

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et al., 39 Mo. 91; *Stewart to use, etc., v. Thomas, adm'r*, 35 Mo. 202; *Davitt v. Donnell*, 38 Mo. 492; *Railroad v. Clark*, 68 Mo. 371-5; *Bank of Missouri v. Russell*, 50 Mo. 531, see 554. (5) All presumptions are in favor of the judgment; and upon pure questions of fact even in equity cases, this court will defer to the finding of the trial court, unless the evidence is such as to induce a decided opinion at variance with the conclusion reached by the trial court. *Ryan v. Gilliam*, 75 Mo. 132. And the finding has additional force when—as in the case at bar—the burden of proof rests on the party against whom the finding is made. And when fraud is the fact in issue, it will not be presumed to exist, when all the facts as well consist with honesty and fair dealing as with an intention to defraud. *Rumbolds v. Parr*, 51 Mo. 592; *Dallam v. Renshaw*, 26 Mo. 533; *Ames v. Gilmore*, 59 Mo. 537; *Henderson v. Henderson*, 55 Mo. 534, 555; *Chapman v. McDucatt*, 77 Mo. 39, 44. (6) *Prima facie* a married woman is incompetent as a witness in a case to which her husband is a party; and if it is claimed that particular facts exist on account of which she is competent to testify, such facts must be shown by testimony other than her own; for until her competency is established her mouth is completely closed; and she can no more speak as to her own competency than as to other facts in the case. *Williams v. Williams*, 67 Mo. 661. (7) Error in excluding evidence will afford no ground for reversing a judgment, when the error is harmless. *Carson v. Cummings*, 69 Mo. 325; R. S. 642, sec. 3775.

SHERWOOD, J.—The object of the plaintiff is to set aside as fraudulent a deed made October 8, 1878, by defendant, Arnot P. Douglass, to his brother and co-defendant, Jas Douglass. This deed was not put to record till January 13, 1879. The judgments upon which executions were issued under which the property in question was sold, were not rendered until over eight months after

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the deed was made, and over five months after the deed was recorded. It does not appear in evidence when the debts on which these judgments were rendered were contracted. It would seem that there were no debts at the time the deed sought to be set aside was made, save the debt due to James Douglass, his brother, and those for which he was responsible as security. These sums amounted to as much as the consideration mentioned in the deed, and a little more. Thus: \$1,700, Evans note and interest; the Rehard note, \$660.00; Pollard debt for \$270.00, and interest; \$70.00 paid on Shaffer, which was assumed, and another note for about four hundred dollars, making in all some \$3,100.00.

In addition to that, evidence was offered without objection that Arnot P. Douglass had a homestead in the land he first owned, the deed to which was filed in 1872, and that he sold this place and applied the proceeds to the purchase of the "Polo place," which he afterwards occupied as a homestead, and which place he subsequently conveyed, as aforesaid, to his brother, James Douglass. Some of the authorities hold that a homestead right must be specially pleaded. Others hold that under the general issue, as pleaded in the case at bar, you may show a right to a homestead. As no objection was made to the introduction of evidence of the character mentioned, any formal plea of homestead, even if one were necessary, may be considered as waived. Looking at the matter in this light the creditors whose claims are the foundation of the present suit, were not interested in the homestead or its proceeds so far as concerns the fifteen hundred dollars, for that amount was beyond their reach, and this sum deducted from the amount paid and assumed by James Douglass for his brother would leave but sixteen hundred dollars, as to which his creditors could lay any claim, and this sum would be covered by other debts paid by James Douglass, leaving out of consideration

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the Evans note and interest, as to which the chief objection is urged.

It must be conceded that there are some circumstances in this case not free from grave suspicion, but deferring, as we must, to some extent, to the trial court, as has been our wont (*Ryan v. Gilliam*, 75 Mo. 132), and looking to the fact, that so far as this record discloses the creditors under whose judgments plaintiff bought, were subsequent creditors, as to whose claims stronger evidence is required as to fraudulent intent on the part of the debtor than when the debtor is in bankrupt circumstances, and the creditors are existing creditors at the time the conveyance charged to be fraudulent is made. The judgment of the lower court, in consideration of the foregoing facts and considerations, should be affirmed. All concur.

THE STATE *ex rel.* HARRIS V. MCCANN, *Appellant.*

1. **Justices of Peace, Election of:** REVISED STATUTES, SECTION 2807. The effect of the enactment of Revised Statutes, 1879, section 2807, in reference to the election and terms of office of justices of the peace was to supersede and repeal all prior statutes authorizing the election of such officers prior to the general election in November, 1882, and any election so held in contravention of said section of the statute was void. (Re-affirming *The State ex rel. the Circuit Attorney v. McCann*, 81 Mo. 479).
2. —. The appointment and commission of respondent as a justice of the peace by the mayor of the city of St. Louis, held to be of no validity, because there was no vacancy to be filled.
3. **Quo Warranto:** OFFICE: BURDEN OF PROOF. In a *quo warranto* proceeding against one for usurping an office, the burden is on the latter to show title thereto.
4. —: RETURN, SUFFICIENCY OF. The return in such proceeding for usurping the office of justice of the peace, is insufficient if it

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fails to show that the respondent qualified under the appointment by virtue of which he claims the office.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

John J. McCann for appellant.

(1) Substantially the whole return is confessed and avoided. It pleads simply *lis pendens*. *Long v. Long*, 79 Mo. 644. (2) The return sufficiently shows that McCann qualified as a justice of the peace. R. S. secs. 2815-16. (3) The removal by such officer of his office or place of holding court out of the district for which he was elected or appointed is *ipso facto* a vacation of it. R. S. secs. 2806, 2833-4. (4) The power to fill a vacancy implies the right of the officer to whom it is given to determine when a vacancy exists. *State ex rel. v. Seary*, 64 Mo. 98. (5) There is no authority for the proceeding here invoked. *State ex rel. v. Boal*, 46 Mo. 529; *State, etc., v. Lawrence*, 38 Mo. 535; *State, etc., v. Stewart*, 32 Mo. 379.

E. A. B. Garesche for respondent.

The title to the office under and by virtue of the election and qualification in November, 1880, being void and it not being alleged in the respondent's return nor proved at the trial that respondent qualified under the commission issued to him in June, 1881, judgment of ouster should have been rendered against him. *State ex rel. v. Vail*, 53 Mo. 107; High on Extra. Rem., secs. 629, 716; *Larke v. Crawford*, 28 Mich. 88; *State v. Gleeson*, 12 Fla. 190; *State v. Ashley et al.*, 1 Ark. (Pike) 513; *Clark v. The People*, 15 Ill. 217; *Flynn v. Abbott*, 16 Cal. 364. There is no sufficient allegation in respondent's return, nor do the facts appear in evidence of an abandonment, or of the fact that there was such a va-

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cancy as authorized the mayor to appoint respondent to the office of justice of the peace for the fifth district of the city of St. Louis. Const. of Mo., Art. 11, sec. 30; *Honey v. Graham*, 39 Texas, 9; *Page v. Harden*, 8 B. Monroe, 669; *State ex rel., etc., v. Ralls Co.*, 45 Mo. 58; *Kouns v. Draper*, 43 Mo. 227.

RAY, J.—This is an information in the nature of a *quo warranto*, at the relation of Harris, circuit attorney for the eighth judicial circuit, city of St. Louis, against the respondent, Patrick McCann, requiring him to show by what warrant or authority he claims to have and exercise the powers and duties of a justice of the peace, within and for the fifth district in the city of St. Louis, Missouri. The information charges, in substance, that one Vincent Mullery, in November, 1878, was duly elected and qualified as a justice of the peace, in said district, in said city, for the term of four years; that he resigned said office in October, 1879, and, thereupon Michael Mullery was duly appointed as his successor, in said office, by the mayor of said city of St. Louis, and qualified thereunder and entered upon the duties of said office. That, afterwards, to-wit, on the fourth of June, 1881, said respondent, McCann, unlawfully usurped and entered into said office of justice of the peace for said district, in said city, and has from that time, until the filing of this information, used and exercised and still uses and exercises the powers and duties of the same without any warrant or legal authority whatever.

The respondent, for return to the writ issued to show cause, admits Vincent Mullery's election and resignation and appointment of Michael Mullery by the mayor, but alleges, in substance, first: That, at the November election in 1880, he was duly elected justice of the peace, in and for said district, in said city; that he was duly commissioned and qualified as such and that, thereupon, said Michael Mullery turned over to him the books, pa-

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pers, etc., of said office, and thereupon ceased to have any office, or place of holding court within said district, and removed his office from said district, and entirely abandoned said office of justice of the peace for said district; that, thereafter, this respondent continued to discharge the duties of said office, by virtue of said election, commission and qualification, until the fourth of June, 1881, when there being a question about the validity of his title to said office, and whether there was a vacancy in said office, the mayor of the city of St. Louis, in order to remove all question as to the validity of respondent's title to said office, did appoint him as justice of the peace for said district, until the general election in 1882, and did issue to respondent a commission authorizing him to hold said office, during said term. Respondent says that he holds said office of justice of the peace, for said district, by virtue of his said election, in November, 1880, and his commission and qualification thereunder, as well as by his said appointment and commission by the mayor of said city, in June, 1881, as aforesaid.

To this return, the relator filed, first, a general denial, and as to that part of said return, which predicates his right and title to said office, upon said election, commission and qualification in November, 1880, the relator replies that at the time of the commencement of this action, and the making of said return, there was, and is another action pending in the Supreme Court, between the same parties, and for the same cause as that set forth in this information and return thereto. The cause was tried by the court without a jury, and there was a finding and judgment for the respondent, from which the relator appealed to the St. Louis court of appeals, where the judgment of the circuit court was reversed, and that court, proceeding to render the judgment which the circuit court should have rendered, awarded judgment of ouster against said respondent, from which he

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appealed to this court. A synopsis of the case is reported in 13 Mo. App. 588, and the opinion, at length, is set out in the record before us.

So far as respondent's title to said office rests upon his said election to that office, at the November election of 1880, that precise question was before this court at a former term, in a similar proceeding between the same parties, and it was there held that the respondent's return in that behalf was insufficient, and judgment of ouster which had been rendered by the circuit court affirmed. *The State ex rel. the Circuit Attorney v. McCann*, 81 Mo. 479; see also *State ex rel. Atty Gen'l v. Ranson*, 73 Mo. 78. That decision disposes of the first part of respondent's return, in this case, and leaves him no title to stand on, except the mayor's appointment and commission of fourth of June, 1881, set up in said return. The court of appeals, in treating of this branch of respondent's return, uses this language: "This appointment and commission were of no validity, unless the office was in fact vacant. At the time when McCann, by virtue of his election in 1880, assumed possession of the office, the office was held by Michael J. Mullery under an appointment and commission, issued by the mayor of St. Louis, for the unexpired term of Vincent L. Mullery, resigned. Under the decision of the Supreme Court, followed by this court, as above stated, the term of Mullery did not expire until the qualification of the person who should be elected to fill the office at the general election in November, 1882. Unless, therefore, Mullery's appointment to the office was invalid, or unless he resigned, abandoned, or became otherwise dispossessed of the office, the appointment by the mayor of this respondent was void, because there was no vacancy to fill.

The rule being that the burden is upon the respondent to show title to the office (High Ex. Leg. Rem., section 229) the inquiry is, has the respondent shown any

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of these facts? In our opinion he has not. He does, indeed, show that under his election to the office, in 1880, Mullery, acting under the advice of the city counsellor and others, surrendered the records of the office to him. But the testimony indicates that Mullery, in doing this, simply acted in good faith, but under the mistaken opinion that respondent had been elected to the office at a valid election. As soon as he found reason to change his opinion he set on foot the prosecution of both of these proceedings to oust the respondent from the office, and he testifies that he intended at no time to abandon it. We are, therefore, of opinion that at the time of the appointment of this respondent, in June, 1881, the title to the office was in Mr. Mullery; that there was no vacancy to fill, and that the appointment was hence void. But if we are wrong in this, there is another ground on which, in our opinion, the circuit court should have given judgment of ouster. It is not set out in respondent's return, and it nowhere appears, that the respondent ever qualified under this appointment of the mayor. He has, therefore, in point of fact, never held the office under it, and the defence which he makes, therefore, amounts to no more than the defence which he made to the former action. It is too plain for argument that an appointment and commission to the office of justice of the peace give the appointee no right, unless he qualifies by taking the oath of office, and causing the same to be recorded as required by sections 2816 and 2817 of the Revised Statutes. The failure to do this, is deemed a refusal of the appointment, and by section 2820, a person so commissioned is forbidden to act until his commission shall have been so recorded by section 2821, a penalty is imposed for so doing. It nowhere appears that this has been done by the respondent since he received the appointment and commission from the mayor."

In these views of the court of appeals we concur, and for these reasons, and others hereinbefore stated, we

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affirm the judgment of that court, reversing that of the circuit court, and awarding judgment of ouster against the respondent. All the judges concur.

RINE V. THE CHICAGO & ALTON RAILROAD COMPANY,
Appellant.

1. **Negligence :** RAILROAD : PERSON ON PRIVATE RIGHT OF WAY : KNOWLEDGE OF BY SERVANTS OF COMPANY : DUTY TO AVOID ACCIDENT. Notwithstanding one who was killed by being run over by a tender and engine was guilty of negligence, in being at the time on the private right of way of the railroad, still if those in charge of the tender and engine saw him in an exposed and dangerous position in time to have avoided the injury, then they were bound to use all reasonable efforts consistent with their own safety and that of the engine and tender to avoid such injury.
2. — : — : — : —. The liability of the company in such case is limited to negligence and want of care occurring after the exposed and dangerous position of the injured party came to the knowledge of the servants charged with the want of care.
3. — : — : — : —. The company is not liable in such case on the theory that the servants of the company might, by the exercise of ordinary care, have become aware of the negligence of the deceased and his dangerous condition in time to have avoided the accident—and failed to do so.
4. — : — : — : —. This case distinguished in the latter respect from the cases of *Frick v. Ry.*, 75 Mo. 595, and *Kelly v. Ry.*, 75 Mo. 138.
5. **Bill of Exceptions :** FILING IN VACATION. An entry of record to the effect that, on motion of defendant, and by consent of plaintiff, leave was given to file the bill of exceptions thirty days after term is sufficient to authorize the filing of the bill. The fact that the court made the order sufficiently shows its consent thereto.

Appeal from Lafayette Circuit Court.—HON. JOHN P. STROTHER, Judge.

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REVERSED.

Macfarlane & Trimble for appellant.

(1) The third paragraph in defendant's answer should not have been stricken out. (a) The statute makes the defence a complete bar to an action for negligence. R. S., sec. 809. (b) It was new matter constituting a defence, and under the code is required to be set up in the answer. R. S., sec. 3521. (c) Contributory negligence is a defence which has to be pleaded. Bliss on Pleading, sec. 200; *Thompson v. Railroad*, 51 Mo. 192; *Loyd v. Railroad*, 53 Mo. 513. (d) This defence is similar to contributory negligence, but different from it. Defendant owed no duty to deceased, if a trespasser, except not to wilfully or wantonly injure him. 1 Thompson on Negligence; *Railroad v. Graham*, 12 Am. and Eng. Ry. Cases, 77; *Railroad v. Goldsmith*, 47 Ind. 43; *Ry. v. Collins*, 87 Pa. St. 366; *Wright v. Railroad*, 129 Mass; 2 Am. and Eng. Ry. Cases, 121 and note; see also authorities cited under appellant's third point. (2) The first instruction given the jury at the request of plaintiff wholly ignored the defence of contributory negligence, and authorized a recovery on proof of negligence on defendant's part alone. This was error. *Johnson v. Railroad*, 77 Mo. 553; *Nugent v. Curran*, 77 Mo. 327; *Henry v. Bassett*, 75 Mo. 92; *Modisett v. McPike*, 74 Mo. 648; *Thomas v. Babb*, 45 Mo. 384; *Henschen v. O'Bannon*, 56 Mo. 289; *Sullivan v. H. & St. Jo. R. R.*, ante, p. 299. (3) Defendant did not owe deceased, who was a trespasser on its track, the duty of watchfulness or care. Unless defendant's acts, which resulted in the death, were wilful, it cannot be held liable therefor. Defendant cannot be held liable for the negligence of its employes in failing to see that deceased had walked on to the side track. Unless they knew he was there their acts were

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not wilful. Defendant's instructions, numbers one to three, should have been given as asked and should not have been amended. *Adams v. Railroad*, 74 Mo. 554; *Yarnall v. Railroad*, 75 Mo. 576; *Zimmerman v. Railroad*, 71 Mo. 478; *Isbel v. Railroad*, 60 Mo. 475; *Maher v. Railroad*, 64 Mo. 276; *Karle v. Railroad*, 55 Mo. 484; *Morris v. Wig. Ferry Co.*, 43 Mo. 330; *Straus v. Railroad*, 75 Mo. 191; *Henry v. Railroad*, 76 Mo. 295; *Hallihan v. Railroad*, 71 Mo. 116; *Railroad v. Hart*, 87 Ill. 529; *Lavenez v. Railroad*, 56 Iowa, 689; *Railroad v. Hall*, 72 Ill. 222; *Railroad v. Depew* [Ohio] 12 A. & E. Ry. Cases, 64; *Railroad v. Cooper*, 12 A. & E. Ry. Cases [Ky.] 5. (4) Defendant's second, fourth and sixth instructions should have been given. They fairly presented the question of contributory negligence. *Powell v. Railroad*, 76 Mo. 81; *Lenix v. Railroad*, 76 Mo. 86; 2 Thompson on Negligence, 1157; *Sullivan v. Railroad*, ante, p 299; *Bell v. Railroad*, 72 Mo. 51. It is a presumption that an adult person will leave the track and get out of danger when he sees an approaching train. *Railroad v. Cooper*, [Ky.] 6 A. & E. Ry. Cases, 5, and authorities cited in note on p. 18; *Railroad v. Graham*, 12 A. & E. Ry. Cases [Ind.] 77; *Railroad v. McLaren*, 8 Cent. L. J. 244; *O'Donnell v. Railroad*, 7 Mo. App. 190. (5) Defendant's third instruction refused should have been given. If deceased knew the engine was approaching him there was no need of the signals. *Holman v. Railroad*, 62 Mo. 257; *Henry v. Railroad*, 76 Mo. 295; *Zimmerman v. Railroad*, 71 Mo. 476; *Purl v. Railroad*, 72 Mo. 169; *Bell v. Railroad*, 72 Mo. 58. (6) The jury should have been instructed under the pleadings and all the evidence to find for defendant. (a) Those in charge of the engine had a right to presume that when deceased looked back and saw the engine approaching, he would get out of the way of danger, and it was not negligence on their part to give

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him no further attention. *Railroad v. Cooper*, 12 A. & E. Ry. Cases [Ky.] 5; see note p. 18; *Ry. v. Graham*, 12 A. & E. Ry. Cases [Ind.] 77; *Ry. v. McClaren*, 8 Cen. L. J. 244; *Kelley v. Ry.*, 75 Mo. 138; *O'Donnell v. Ry.*, 7 Mo. App. 190. (b) It was gross negligence on the part of deceased when he saw the engine approaching to step onto another track without knowing upon which track the engine would run. *Hallihan v. Ry.*, 71 Mo. 116; see authorities cited *supra*; *Zimmerman v. Ry.*, 71 Mo. 477; *Henry v. Ry.*, 76 Mo. 288; *Harlan v. Ry.*, 64 Mo. 481; *Harlan v. Ry.*, 65 Mo. 22. (c) If it was negligence in the train men not to see deceased when he walked onto the side track, it was also negligence on the part of deceased to go onto the side track, and both being contemporaneously negligent the loss falls on plaintiff. 2 Thompson on Negligence, 1157; *Kelly v. Ry.*, 75 Mo. 138; *Straus v. Ry.*, 75 Mo. 191; *Purl v. Ry.*, 72 Mo. 168; *Adams v. Ry.*, 74 Mo. 553; *Powell v. Ry.*, 76 Mo. 80; *Bell v. Ry.*, 72 Mo. 50; *Lenix v. Ry.*, 76 Mo. 90; *Ry. v. Carrigan*, 35 Mich. 468.

J. D. Shewalter for respondent.

(1) The agents of a railroad in charge of an engine, in running the same, are bound to exercise ordinary care, the degree of it being dependent on the place and circumstances. *Kennayde v. Ry.*, 45 Mo. 260; *Karle v. Ry.*, 55 Mo. 476; *O'Flarty v. Ry.*, 45 Mo. 72; *Kelly v. Ry.*, 75 Mo. 138. (2) If deceased was guilty of negligence there can be no recovery unless the defendant's agents knew or (as the necessary sequence of the first point) could have known by the exercise of ordinary care (regard being had to the place), the danger to which deceased had exposed himself in time to avert the accident with safety. *Kelley v. Ry.*, 75 Mo. 138; *Harlan v. Ry.*, 65 Mo. 25-26; *Isbell v. Ry.*, 60 Mo. 481. If so, then the negligence of

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deceased ceases to be any excuse. *Kelley v. Ry.*, 75 Mo. 140. (3) The record shows consent only of plaintiff for respondent to file its bill of exceptions in this case. This is insufficient. *McCarty v. Cunningham*, 75 Mo. 279; *Spencer v. Ry.*, 79 Mo. 500. And there is nothing but the record proper for this court to examine. (4) The trial court did not err in striking out the first paragraph of the answer. The defendant was not authorized to kill the deceased because he was at the time of the injury a trespasser. The statute does not make the trespass a bar to the suit. (5) The first instruction for plaintiff is not defective in that it ignored the defence of contributory negligence, because the latter is in its nature a defence. (6) If the defendant's servants saw or knew the danger of the deceased after his negligence occurred in time to avert the accident, it is liable, and the servants were bound to use ordinary care, and this requires them to see and know what can be seen and known by the exercise of ordinary care. *Kelly v. Ry.*, 75 Mo. 140; *Frick v. Ry.*, 75 Mo. 612; *Karl v. Ry.*, 55 Mo. 477.

BLACK, J.—The plaintiff sued for damages because of the death of her unmarried son, nineteen years of age. The petition states that defendant's servants negligently ran an engine and tender over him. The answer is, that whilst the engine and tender were being backed on and along the track, deceased negligently walked on the track and in front of the tender, because of which he was run over. The reply states, that notwithstanding deceased was on the track, the servants of defendant could and in fact did see him in ample time to have stopped the engine, but failed to do so. Plaintiff resided at Blackburn, a station on the road where she kept a hotel. She was accustomed to prepare lunch for the train men. The deceased was in the habit of going to Corder, another station west of Blackburn, two or three times a week to

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get meat for his mother's table. He would go on one freight train and return on another, and had become well acquainted with the train men. He often assisted them in loading and unloading freight, would set brakes, throw switches, and the evidence shows that he sometimes rode on the engine. On the occasion in question he rode on the freight train from Blackburn to Corder as usual. The road at the latter place runs east and west. The depot is on the north side of the track. South of the depot, besides the main track, are two side tracks; on the outside one, and nearly opposite the depot, is situated the freight warehouse. Lafayette street is four or five hundred feet west of the depot; crosses the railroad at right angles, and the open depot grounds appear to extend up to that street. Two switches and their targets are located between this street and the depot—the first sixty or seventy feet east of the street, and the second on the first side track, sixty or seventy feet still further east; from these switches the side tracks extend eastward beyond the depot and warehouse. The train in question stopped at the depot, and the evidence tends to show that young Rine assisted in unloading some freight; also that he heard the station agent inform the conductor that there was some machinery to be loaded at the warehouse; but this is controverted by other evidence. At all events, three cars with the engine were cut loose from the train, pulled west and then run on the outer side track to the warehouse.

While the machinery was being loaded into these cars the deceased went to a hotel on the street before named, and one hundred and fifty feet north of the main track, on his errand. In the meantime the engineer and fireman ran the engine and tender a quarter of a mile west to a coal shaft and took on coal. Rine left the hotel, passed along the street to the track, and thence along the same towards the depot. At the same time the engine and tender backed in from the coal shaft at the rate of

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eight or ten miles an hour. Between the first and second switches Rine was run over by the tender as it and the engine passed over the side track towards the warehouse. The witnesses all say that when he was at, or just passed, the first switch, he halted, looked towards the approaching engine; some say he stepped off the main track to the side track, others thought he left the track, and others say he appeared to have stepped across the switches. When he thus looked back the engine was from thirty to fifty yards off and he only walked ten to twenty steps along the side track with his back towards the engine until struck. The engineer was on the right side of the engine at his proper place. The fireman was on the tender arranging the coal and in plain view of Rine. He says he saw Rine when at the crossing; that Rine started down the side track between the switches; that Rine looked at the engine and then stepped off on the edge of the ties; that when Rine stepped out of the way he paid no more attention and went to his work. The evidence shows that the engine could have been stopped in a distance ranging from ten to thirty feet. There is evidence that the bell was, and that it was not ringing, but we do not regard this as a matter of any consequence, for the admitted facts are that Rine saw the engine coming, and he was not killed at any crossing. Whether the bell was rung or not is a matter of no consequence. *Bell v. Ry.*, 72 Mo. 58.

That Rine was guilty of negligence in being on either the track or side track is conceded. So far as the trial of the issues in this case are concerned he was and must be regarded as a trespasser. R. S., 1879, sec. 809. Still all this did not relieve the defendant from all obligations of care towards him. The third defence, which only set up that deceased was not connected with or employed for the road, and was killed while on the track at a place where the statutes declare him to be a trespasser, was properly stricken out. If the facts are as stated by the

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fireman, *i. e.*, that deceased was on the side track when he looked back and saw the engine and he then stepped off, the fireman had a right to assume that he got out of the way and would stay out of the way. The court fairly instructed on this theory of the case, and had this been the whole case it would have been the duty of the court to have directed a verdict for the defendant. Most of the evidence tends to show that when Rine looked back, saw the engine and tender coming, and was seen by the fireman, he stepped from the main to the side track, and walked on that, doubtless erroneously assuming that the engine would continue on the main track to the depot. It may be inferred from the evidence, that the fireman knew the switches were open and the engine and tender were going to the warehouse, and that Rine was in a dangerous place. Notwithstanding the deceased was guilty of negligence, as beyond all doubt he was, still, if those in charge of the engine and tender saw him in an exposed and dangerous position in time to have avoided the injury, then they were bound to use all reasonable efforts consistent with their own safety and that of the engine and tender, to avoid the injury. *Adams v. Ry.*, 74 Mo. 554. But under the circumstances disclosed in this case many authorities hold that the liability should be limited to negligence and want of care after the exposed and dangerous position of the injured party comes to the knowledge of those servants who are charged with the want of care. *Yarnall v. Ry.*, 75 Mo. 583; *Maher v. Ry.*, 64 Mo. 267; *Zimmerman v. Ry.*, 71 Mo. 477.

The defendant asked the court to give the following instruction, omitting the words in italics:

"3. Defendant is liable in this case only if its servants failed to exercise ordinary care to prevent the injury, after they became aware of the danger to which deceased was exposed; *or after they might have become aware thereof by the exercise of ordinary care*; and by

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ordinary care is meant such care as would be ordinarily used by prudent persons performing a like service, under similar circumstances."

The court modified the instruction by inserting the italicised words, and of this action of the court error is assigned. According to the authorities before cited, the instruction should have been given as asked. There is no analogy between the case at bar, as respects the question under consideration, and those cases where the servants fail to observe some municipal or statutory regulation and the injury is attributed in whole or part to that, or where they are not found at their proper places when passing a public crossing, or going through a populous city or district, or fail to heed due warning of danger. These observations are sufficient to distinguish this case from *Frick v. Ry.*, 75 Mo. 595, and *Kelley v. Ry.*, *Ib.* 138. Here the fireman and engineer were at their proper places, were not going at an unlawful rate of speed, and were not negligent in the management of the engine and tender, unless it was after one of them saw deceased was in actual danger. The deceased was a man of discretion; he was familiar with the operation of the train, and also with the operation of switches, over one of which he had just passed. All this the fireman well knew, and he had a right, under the circumstances, to assume that the deceased would use ordinary prudence, at least, for his own protection. Such a qualification as the one in question will be proper in some cases, but it cannot and ought not to be applied in this case. The defendant ought not to be held liable by anything short of proof and an unqualified finding that these servants negligently failed to exercise reasonable care to avoid killing Rine when and after they actually became aware that he was in an exposed and dangerous position. It ought also to appear that they then had the time and the opportunity to have avoided the injury, and could have done so by the use of reasonable care in that behalf. This instruction and

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the first and second asked by the defendant, and which were qualified in a like manner, should have been given as they were asked, and those given for the plaintiff should be made to conform thereto.

The pleadings virtually admit, and all the evidence shows, that deceased was on the track where and when he should not have been, all of which is entirely ignored in the first instruction. Although we may be able to see from the whole series of instructions that such an instruction worked no harm, still the better practice is to omit such instructions.

The bill of exceptions shows that when the motion in arrest and for new trial were overruled, the following entry was made: "On motion of said defendant and by consent of plaintiff leave is given said defendant to file bill of exceptions thirty days after this term," etc. The very fact that the court made the order sufficiently shows its consent thereto, and the consent of the parties to the suit is clearly expressed, for one asks the leave and the other grants it. Nothing more ought to be required. In so far as *Spencer v. Ry.*, 79 Mo. 500, and *McCarty v. Cunningham*, 75 Mo. 279, do or are supposed to announce a different rule, they are hereafter to be regarded as modified by what is here said. The record shows the court was still in session on April 20, 1883. The bill of exceptions was filed on the seventeenth of May following, and it is, therefore, a part of the record of the case.

The judgment is reversed, and the cause is remanded for new trial. All concur.

SHERWOOD, J., CONCURRING.—I am glad to see that the heresy in relation to bills of exceptions has at length been gibbeted. In *McCarty v. Cunningham*, 75 Mo. 279, the ruling now made was expressly urged on our attention and a motion for rehearing was filed, but it was overruled. I dissented in that case, and have so done

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since, but I am not so marked. I was never able to see how any entry of record could be made without the consent of the court first had and obtained. Such consent is of necessity implied by the fact of the entry being made. The entry of record showing consent of parties to filing the bill of exceptions in vacation is all that is requisite. *West v. Fowler*, 55 Mo. 300; *Ellis v. Andrews*, 25 Mo. 327; *State v. McOblenis*, 21 Mo. 272; *West v. Fowler*, 59 Mo. 40.

THE STATE V. WALLER *Appellant.*

1. **Criminal Practice : VARIANCE.** The wound, on a trial for murder, may be proved by the state to have been made on a part of the body different from that alleged in the indictment.
2. ——— : **OBJECTION TO JUROR.** The objection that one of the jurors was not a citizen of the county where the trial was had comes too late under the statute (R. S., sec. 2778) after his acceptance and qualification as a juror.

Appeal from Livingston Circuit Court.—HON. JAMES M. DAVIS, Judge.

AFFIRMED.

L. A. Chapman and Davis & Wait for appellant.

B. G. Boone, Attorney General, for the state.

(1) The omission of the word "county" after the word "Livingston" in the indictment is cured by the statute of jeofails. Section 1821, Revised Statutes. The venue is subsequently and expressly laid at "Livingston county in the state of Missouri." (2) The defendant in-

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sists that the evidence is insufficient to support the indictment because it was shown that the wound from which Shepherd died was inflicted in his arm when the indictment charges that it was on his body. This is immaterial. R. S., sec. 1821. It was not necessary to prove the facts as alleged. *State v. Edmundson*, 64 Mo. 398 and cases cited; 2 Bish. Crim. Law (2 Ed.) sec. 525; 4 Parker C. C. N. Y., 535; 22 N. Y., 147; *Whelchell v. State*, 23 Ind. 89; *Jones v. State*, 35 Ind. 122. (3) The instructions given present every phase of the case, under the evidence, fully and fairly to the jury. This was all that was required. The instructions refused were not supported by the testimony, are incorrect declarations of law and were properly refused. (4) Defendant's motion for a new trial contains the further averment that one of the jurors on the trial panel was not a resident of the county of Livingston and was not a qualified juror of Livingston county. This was a ground of challenge to the polls; and the objection comes too late when made for the first time in a motion for a new trial. 1 Bish. Crim. Proc. (2 Ed.) sec. 923 and cases cited. After a juror is sworn no exception can be taken to him on account of his being a non-resident of the county. *Mima Queen v. Hepburn*, 7 Cranch, 290. In this state, it is provided by statute that no exception to a juror on account of citizenship, non-residence, state or age shall be allowed after the jury is sworn. R. S., sec. 2778.

NORRIS, J.—Defendant was indicted in the Livingston county circuit court at its January term, 1884, for murder in the first degree for stabbing and killing one Green Shepherd on the twenty-fourth of December, 1883. He was put upon his trial at the April adjourned term, 1884, of said court and was convicted of murder in the second degree, from which he has appealed to this court. The grounds stated in the motion for new trial are substantially, that the court erred in admitting evi-

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dence and in giving improper and in refusing proper instructions; that Beach, one of the jurors, was not at the time of the trial a citizen or resident of Livingston county.

The physicians who attended the deceased on the day he was stabbed testified that he was stabbed in the upper part of the arm, the wound being four inches deep, and an inch and a half wide at the mouth, cutting and severing the main artery, causing his death. This evidence was objected to on the ground of variance from the indictment, which alleged that the wound was inflicted on the body of the deceased. This objection was properly overruled on the authority of the case of *State v. Edmundson*, 64 Mo. 398, where it is held that though an indictment may allege the wound to have been inflicted on one part of the body it is not a variance justifying our interference, when the state is allowed to prove on the trial that the wound was inflicted *on a different part of the body from that alleged*.

The omission of the word "county" after Livingston in the indictment is cured by section 1821, Revised Statutes. The indictment, besides having the caption, "State of Missouri, Livingston county," expressly alleges "that Lewis Waller, late of said county * * * at the said county of Livingston, and state of Missouri, in and upon," etc.

As to the objection that Beach, one of the jurors, was not a citizen of Livingston county, it may be said that while this would have been a good cause for challenge when he was offered as a juror, the objection, if not then made, comes too late after his acceptance and qualification as a juror, it being provided by section 2778, Revised Statutes, "That no exception to a juror on account of citizenship, non-residence, state or age shall be allowed after the jury is sworn." The court on behalf of the state gave instructions both as to murder in the first and second degrees and also as to manslaughter in the fourth degree. It is sufficient to say of them, without incor-

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porating them in this opinion, that they are such as have been repeatedly sanctioned by this court; that the various grades of homicide to which they relate were properly defined, and they are the only grades of homicide to which the evidence could be applied.

Seven instructions were also given on behalf of defendant, among them one defining manslaughter in the fourth degree, and six were refused. The first of the refused instructions related to manslaughter in the fourth degree. Two instructions had already been given by the court, one for the state and one for the defendant, covering fully that grade of offence, and the instruction was properly refused for that if for no other reason. The second instruction refused was simply in the nature of a demurrer to the evidence, and was properly overruled as there was abundant evidence tending to show the defendant guilty of one or the other of the grades of homicide, defined in the instructions given by the court.

The other refused instruction related to the reasonable doubt that would authorize an acquittal. The court had already in proper instructions, given on behalf of the state as well as defendant told the jury that if from the evidence they had a reasonable doubt of defendant's guilt in any degree of homicide defined, they must acquit, and for this reason the instructions were rightfully refused. We find nothing in the record authorizing us to interfere with the judgment and it is hereby affirmed. All concur.

BAKER, *Administrator, Appellant*, v. HUNT.

1. **Revised Statutes, Section 666: DEBTOR AND CREDITOR: RELEASE OF DEBTOR.** Any creditor of two or more debtors may, under Revised Statutes, section 666, compound with any and every

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one or more of his debtors for such sum as he may see fit, and release him or them from all further liability for such indebtedness without impairing his right to collect the balance of such indebtedness from the other debtor or debtors not so released; and said section applies to all debts whether evidenced by note or otherwise. But such release does not impair the right of any debtor not so released to have contribution from his co-debtors.

2. ———: ———: ———. The releases introduced in evidence in this case held to be a complete defence to the notes sued upon.

Appeal from Cooper Circuit Court.—HON. E. L. EDWARDS, Judge.

AFFIRMED.

Draffen & Williams for appellant.

(1) The payment of a less amount than the sum really due is no discharge of the debt. Nor will such payment of a part of the real debt constitute a sufficient consideration for a promise to cancel or discharge the remainder. *Riley v. Kershaw*, 52 Mo. 224; *Price v. Cannon*, 3 Mo. 318; 2 Dan. on Neg. Inst. (2 Ed.) p. 284, sec. 1289; *Otto v. Klauber*, 23 Wis. 471. "An express agreement, even to accept a smaller sum for a greater, legally due, will not, without more, bar a recovery for the balance." *Myers v. Byington*, 34 Iowa, 205; *Willis v. Gammil*, 67 Mo. 730; *McAllister v. Denzin*, 27 Mo. 40; *Rea v. Owen*, 37 Iowa, 262; *Obendorf v. Union Bank*, 1 Amer. Rep. 31; *Ryan v. Ward*, 8 American Rep. 539; 68 Indiana, 436. In the case at bar, there was no consideration whatever for the pretended agreements to release the defendant from this indebtedness. As to negotiable paper see note to 6 Exchequer Rep. 852-3-4; 2 Parsons on Bills and Notes, 235. (2) The provision contained in section 666, page 107, volume 1, Revised Statutes, 1879, which is the same as in General Statutes of 1865, has no bearing upon the question involved in this case. (3) These promises cannot

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be regarded as gifts or equitable releases of the liability of defendant for the debt. First, because the answer in the case sets up no such claim. *Cadwallader v. West*, 48 Mo. 483. Second, because Bousefield retained the notes, and it will not be contended that he designed to give Hunt the debts evidenced by these notes. Third, they cannot be upheld as equitable releases. They are mere promises without consideration and cannot be upheld in equity any more than at law. *Irwin v. Johnson*, 16 Cen. L. J. 189; *Henderson's Adm'r v. Henderson*, 21 Mo. 379.

Smith & Krauthoff with *Cosgrove, Johnson & Pigott* for respondent.

(1) "An exception to the rule of common law that a right of action for breach of contract cannot be discharged by a release or agreement, not under seal, occurs with the contracts formed by bills of exchange and promissory notes, which are regulated by rules founded in the custom of merchants; the liability upon these instruments, both before and after they become due and payable, may be discharged by the holder by express dispensation or waiver, without deed and without consideration." Leake on Contracts, 925, 795; 2 Whart. on Contracts, sec. 1032. And this rule of the law merchant is recognized and approved by all the leading authors. Byles on Bills (11 Eng. Ed.) * 196 *et seq.*; 2 Chitty on Cont. (11 Am. Ed.) 1149; 1 Addison on Cont. (3 Am. Ed.) sec. 364; Smith's Merc. Law (3 Ed.) 351; Story on Bills (4 Ed.) sec. 266; Anson on Cont., top page 249; *Foster v. Dawber*, 20 L. J. Ex. 385; *Whalley v. Tricker*, Camp. 35; *Farquhar v. Southey*, 2 Car. & P. 497, 500; *De La Torre v. Barclay*, 1 Stark. 7; *Cook v. Lister*, 13 Com. B. (N. S.) 542, 593 and note 597; *Walker v. McCulloch*, 4 Me. 421; *Caldwell v. Gillis*, 2 Por. (Ala.) 526. (2) But this question is set at rest in

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defendant's favor by section 666, Revised Statutes. (3) The rule contended for has never been regarded with favor by the courts, and it has been said that it "is technical and not very well supported by reason, and courts have departed from it upon slight distinctions." *Kellogg v. Richards*, 9 Wend. 116; 2 Parsons on Notes and Bills, 217 (2 Ed.); *Jones v. Perkins*, 29 Miss. 139, 142. (4) But the plaintiff's action must fail upon the additional ground that the receipts and memoranda signed by Bousefield are in effect covenants by him not to sue the defendant on these notes. Bousefield expressly stated that he no longer held Hunt as security, "or in any other way accountable" on said notes, and this is in effect a covenant never to sue him thereon, for an attempt to collect by suit is certainly an endeavor to hold "accountable." Such agreements have always been held covenants not to sue and be a bar to an action. *Phelps v. Johnson*, 8 Johns. 53; *Jones v. Bank*, 29 Conn. 25; *Reed v. Shaw*, 1 Blackf. 245; *Upham v. Smith*, 7 Mass. 265; *Clopper v. Union Bank*, 7 Har. & Johns. 92. (5) But the plaintiff's case must fail upon another ground. Hunt was only a surety upon these notes. Bousefield did all in his power to release him from liability on them, and for over three years this release stood unquestioned and no attempt was made to hold him bound, nor notice given of an intention to so hold him. In these circumstances, neither Bousefield nor his representative can now be permitted to collect this note from him.

SHERWOOD, J.—Action on two promissory notes. Defence to the action based on two similar papers signed by the intestate in the following form:

"PISGAH, Mo., December 8, 1877.

"In consideration of the one dollar to me in hand paid by William B. Hunt, the receipt of which is hereby acknowledged, I the undersigned hereby agree to re-

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lease William B. Hunt from any further liability incurred by him on account of said William B. Hunt having signed a promissory note conjointly with Jonathan Hunt, David A. Jones and Daniel Hunt for the sum of seven hundred dollars. Said note was dated October 30, 1867, payable one day after date to my order. Said note has four credits placed on its back since given.

“R. D. BOUSEFIELD.”

Section 666, Revised Statutes, 1879; is as follows: “It shall be lawful for every creditor of two or more debtors, joint or several, to compound with any and every one or more of his debtors for such sum as he may see fit, and to release him or them from all further liability to him for such indebtedness, without impairing his right to demand and collect the balance of such indebtedness from the other debtor or debtors thereof, and not so released; provided, that no such release shall impair the right of any debtor of such indebtedness not so released to have contribution from his co-debtors as is by law now secured to him.”

With such statutory provisions before us it is needless to look to common law precedents and authorities when inquiring what force and effect shall be given to the papers above relied on as a defence herein. The statute is plain and unambiguous in its language, and is, therefore, its own interpreter. Its terms apply to “every creditor of two or more debtors” and it makes it “lawful” for such creditor to compound with any and every one or more of his debtors for such sum as he may see fit, and to release him or them from all further liability for such indebtedness. It is too clear for argument that the requirements of this section have been fully met by the papers executed by the plaintiff’s intestate. This section applies to *all* debts howsoever they may be evidenced, whether by note or otherwise.

The section in question has been on our statute

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book for over thirty years, yet so far as I am able to discover, has never been passed upon. The case of *McAllister v. Dennin et al.*, 27 Mo. 40, was decided without any reference to the statute, but was correctly decided even had the statute been invoked; for there judgment had been obtained in favor of McAllister & O'Flaherty, partners, against Lowrie, Dennin and Rees. Subsequently McAllister for himself and his deceased co-partner for the consideration of five hundred dollars released Lowrie alone from all further liability on the judgment. Afterwards and on the foregoing facts Dennin and Rees moved the court to enter satisfaction of the judgment. The statute does not apply to a case of that sort. When compliance is had with its terms the effect is to discharge the particular debtor who is released and to debar the creditor from suing him; but the release goes no further than this; rights of contribution and the particular debtor and his co-debtors are still expressly preserved.

The case of *Willis v. Gammill*, 67 Mo. 730, is not any more in point for three reasons: 1. The statute was not invoked nor commented on. 2. There were three makers on the note and the agreement made was not for the release of the two makers who paid a certain sum, but for the absolute discharge of the debt, the note evidencing the debt being surrendered to them. 3. The agreement was made with the administratrix of the deceased payee and she was held incompetent in the circumstances to "forgive the debt." Nor do the decisions of this and other courts apply when the question is simply whether the payment by a single debtor of a part of his debt will release the residue. The statute only becomes operative when the conditions which it prescribes exist and meet with compliance. Therefore, judgment affirmed. All concur.

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CROW, *Appellant*, v. MEYERSIECK.

1. **Proceedings to Adjudge one a Lunatic, Notice of.** The notice to one of a proceeding against him in the probate court, to have him adjudged a lunatic and incapable of managing his affairs, corresponds to a summons in an ordinary action, and like the latter, forms a part of the record proper.
2. — : **RECITALS OF RECORD.** A recital in the finding and judgment of the court that "due notice" of the proceeding had been given to the alleged insane person is sufficient in the absence of anything to the contrary in the record. But it is competent to contradict such recital by showing by the record that the notice attempted to be given was fatally defective and void.
3. — : **ENTRY OF GENERAL APPEARANCE.** But notwithstanding such failure of notice, if the alleged insane person enters a general appearance to the proceeding, a judgment against him will be binding, at least not open to collateral attack.

Appeal from Franklin Circuit Court.—HON. A. J. SEAY, Judge.

AFFIRMED.

Crews & Booth for appellant.

(1) It was competent for appellant to introduce the notice and return of service under which the probate court acted, to show it acted without having first acquired jurisdiction of the person of appellant and that for want of jurisdiction all of its proceedings were void. R. S. secs. 1175, 1179; *Ib.*, secs. 1027, 1029; *Bateson v. Clark*, 37 Mo. 31; *Mortland v. Holland*, 44 Mo. 58.

(2) The information in writing, and notice, were the jurisdictional papers. Jurisdiction must be shown by the whole record, and when it appears from it that the court has no jurisdiction either over the person or subject matter, the judgment rendered in such case is void. *Brown*

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v. Woody, 64 Mo. 547, 551; *Howard v. Thornton*, 50 Mo. 291; *Lenox v. Clarke*, 52 Mo. 115.

T. A. Lowe for respondent.

(1) The answer of respondent set up a complete defence to the petition, and if true, would bar a recovery, and the *onus* of proving the matters set up in the answer necessarily devolved upon the respondent. *Steph. Pl.* 51 (8 Am. Ed.); *Kortzendorfer v. City of St. Louis*, 52 Mo. 204; 1 Greenl. Ev. sec. 556 (7 Ed.) (2) The probate courts of this state have original and exclusive jurisdiction in the matter of appointing guardians of persons of unsound mind (R. S. 1879, sec. 1176), and although a court of limited jurisdiction, yet a court of record (R. S. 1879, sec. 1175), and the judgments of such courts are just as conclusive and import the same verity until reversed or set aside as courts of general jurisdiction. *Freeman on Judgments*, secs. 122, 123, 524, 531. And the appellant was bound by the judgment. *Freeman on Judgments*, sec. 152; *Heard v. Sack*, 81 Mo. 610. The appearance of appellant waived all defects as to jurisdiction, unless his appearance was for the purpose of pleading to the jurisdiction. *Tower v. Moore*, 52 Mo. 118; *Hite v. Hunton*, 20 Mo. 286; *Rippstine v. Ins. Co.*, 57 Mo. 86; *Crear v. Clough*, 52 Mo. 55; *Griffin v. Van Meter*, 53 Mo. 430.

RAY, J.—This is an action for injuries to the person and property of plaintiff, in depriving him of his liberty, confining him in a lunatic asylum, failing to provide him while held in custody proper medical care and attention, and selling and disposing of his personal property. The defence is a plea that the plaintiff was duly adjudged to be a person of unsound mind, and defendant appointed guardian of his person and estate by the probate court of Franklin county, and that as such guardian defendant

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took charge of and confined appellant at the asylum and sold the property, etc. Plaintiff contested the matter so pleaded as a defence, on the ground, that the proceedings of the probate court were void for want of jurisdiction of the person of plaintiff. The defendant claimed, at the trial, that under the pleadings the *onus* was on him to establish the defence set up in the answer, and the affirmative of the issue, thus asked, was given him and he thereupon introduced in evidence the record of the proceedings in the probate court, reciting the facts that due notice of the application for an inquiry into the mental condition of the appellant had been given, and the appearance of the parties, and the finding that the plaintiff was a person of unsound mind, and the order of appointment of the defendant as guardian of the person and estate of the plaintiff, the giving of bond by the defendant as guardian, and the further finding that the plaintiff was so furiously mad, and so far disordered in his mind as to endanger his own person and the persons and property of others, and the order of the court upon defendant to convey plaintiff to the state lunatic asylum, to remain until cured, or otherwise ordered, and to pay all costs for the care, attention, board and clothing, and other necessary expenses of the plaintiff from time to time, as should become necessary under the circumstances, and that the information of the insanity of the plaintiff was filed on the thirteenth day of June, 1881. The defendant then rested and plaintiff, for the purpose of showing that the probate court had not duly acquired jurisdiction over the person of said M. S. Crow, defendant therein, and that its said proceedings were, therefore, void, offered in evidence the original notice, upon which said proceedings of said probate court were had, together with the return of service of said notice endorsed thereon. Upon objection to its admission in evidence the same was excluded by the court. Whereupon plaintiff took a nonsuit, with leave to set the same aside,

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and after an unsuccessful motion for that purpose, brings the case here by appeal. The service of said notice and filing of said information, the inquest as to the insanity of said M. S. Crow by the jury, and the verdict in that behalf, and the order of the appointment of said Meyersieck as guardian, and the giving and approving of his bond as such, and the order of the court to said guardian to cause him to be conveyed to the state lunatic asylum upon a showing by said guardian that he was so furiously mad, or disordered, in his mind, as to endanger his own person, and the person and property of others, constituting the entire proceedings in the probate court in the matter of the insanity of said M. S. Crow were had, in the order named, upon one and the same day, to-wit: On the said thirteenth day of June, 1881.

It would seem that proceedings of this kind had been contemplated some six months before, and a notice then prepared, but that the matter was abandoned for the time being. At any rate, said notice of date January 20, 1881, was served on said Crow on said June 13, 1881, which stated that information in writing that he was of unsound mind and incapable of managing his affairs, would be filed in the probate court of Franklin county, on the twenty-first of January, 1881, which was an impossible date, and one long past, at the date of its service. The action of the court, in excluding this notice when offered by the plaintiff to show a want of jurisdiction, by the probate court, over the person of said Crow, is as already seen, the only question before us. The notice and information, in writing, in cases of this sort, where the court is proceeding by way of and upon information to hold its inquest of lunacy, unsoundness or incapacity of mind are jurisdictional papers. The notice corresponds to the summons in ordinary actions, and like the latter, forms a part of the record proper. The judgment offered in evidence by defendant contained a recital that "due notice" of the application had been given to said Crow, and this

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recital is a finding of the court, and is to be held sufficient where the record is otherwise silent. The general finding and recital of notice in said judgment is, we think, to be construed in connection with the whole record, and will be limited and held to refer to the particular notice, if any, shown by other parts of the record, and generally if the notice attempted to be given, as the same appears by the record is fatally defective, there is under the authorities no presumption of notice in any other mode or manner. In this case, in making said general recital of due notice, the court in its said judgment is evidently passing on the void notice set out and declaring it to be due and sufficient notice. So that plaintiff's position is, we think, so far correct. The pretended notice was a part of the record, and when admitted with its infirmity apparent on its face, the general recital or assertion of due notice on the record was, as already said, thereby contradicted, and in this view a want thereof, we think, affirmatively appears upon the face of the record proper.

Nevertheless, as we shall see, its exclusion was not, we think, material and prejudicial error, requiring us to reverse the judgment. Other parties may waive objections to defective or void notices, and voluntarily appear, and thus come within the jurisdiction of the court of otherwise competent jurisdiction. And why, we ask, may not the plaintiff? Lunatics, it is true, are under disability and exempt from the force and effect of their contracts, but are within the control and jurisdiction of the courts. They may attend or appear in court by attorney. Judgments against them obtained in courts of competent jurisdiction are not void or voidable upon that ground and cannot be reversed in actions at law for that reason. Freeman on Judgments (3 Ed.) sec. 152, and authorities in note six. And in proceedings of this sort where the record of a court, having exclusive and original jurisdiction both as to persons and subject mat-

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ter, recites the attendance or appearance of the party, and omits and fails to show such appearance was for the purpose of objecting to the jurisdiction, and fails and omits to show that any objection was made thereto by him, or in his behalf, is not such judgment of such a court in such case, in actions at law, binding and conclusive, and not subject at least to collateral attack? We think it is. Such is the state of facts presented by the present record. Although this is denied by plaintiff's counsel, who claims and so contends, that the record does not make mention of said M. S. Crow as a party or show his appearance the proceedings being *ex parte* and entitled simply "in the matter M. S. Crow, insane." But this view is not, we think, correct. The record is not silent in this behalf, but recites among other things, "now at this day come the parties," etc. When it thus recites, as it does, to whom and to what parties could reference be thus made unless to said M. S. Crow, whose insanity is the matter and subject of inquiry, and to the party or parties at whose instance the proceedings were had, and who became liable under the statute for the cost in the event of his discharge? These parties come, that is, are present and in attendance before the court. There is no allegation or claim made in the petition in this case, that said M. S. Crow was not actually in attendance at said trial before the probate court, and no proof offered from the record of said proceedings, or extraneously even, to contradict the said recital in this behalf, and the same is, we think, sufficient to show the appearance, and is a finding conclusive of that question.

Where no appearance is shown the notice would be admissible upon the question of what the whole record showed in this behalf, but its admission would be, we think, without value and its exclusion without prejudice to the party offering it in the face of a record not silent as to his said appearance, but affirming and asserting it, notwithstanding the want of said notice, which, as we

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have seen, was the case here. It follows then that the court's said action in excluding said notice was not error materially and prejudicially affecting the action and requiring us to reverse the judgment, and for that reason its said judgment is affirmed. All concur.

THE STATE V. MILLS, *Appellant*.

Criminal Practice: EVIDENCE. Where no objection is made nor exception saved to the cross-examination of a defendant in a criminal case, as to matters not testified to in chief, the same is waived.

Appeal from Jasper Circuit Court.—HON. M. G.
MCGREGOR, Judge.

AFFIRMED.

J. C. Trigg and *E. H. Wyatt* for appellant.

B. G. Boone, Attorney General, for the state.

NORTON, J.—Defendant Mills was, with three others, jointly indicted in the Jasper county circuit court, at the September term, 1884, for an attempt to commit burglary. He was separately tried at the same term, and was convicted and sentenced to two years imprisonment in the penitentiary.

The indictment is based on section 1645, Revised Statutes, and complies in all essential particulars with the requirements of said section, and sufficiently sets forth the offence therein designated. Defendant was introduced as a witness in his own behalf, and on his cross-examination by the state he was asked one question

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touching a matter not strictly embraced in his examination in chief. No objection was made at the time to the question, nor was any exception saved. While we have held, *State v. McGraw*, 74 Mo. 573, and *State v. McLaughlin*, 76 Mo. 320, that it was not permissible to allow a defendant in a criminal case to be cross-examined as to matters not testified to by him in his examination in chief, we have also held, *State v. McDonald*, 85 Mo. 539, that in regard to new matters, the same rule applies in both civil and criminal cases. No objection having been made at the time to the question, nor exception saved, it cannot now be considered. The instructions given by the court are unexceptionable, and the evidence tends strongly to support the verdict of the jury, and there is nothing in the record which we have examined to justify an interference with the judgment, and it is hereby affirmed. All concur.

GUFFEY V. O'REILEY, *Appellant*.

1. **Deed: DESCRIPTION.** General words of description in a deed or other instrument may be modified and restricted by particular words following them.
2. **Tax Deed, Recitals in.** Where it affirmatively appears, from the recitals in a tax deed, that no judgment was rendered against the land sold for taxes and intended to be conveyed by such deed, it is void.
3. **Tax Deed, Form of.** Where the statute requires no form of tax deed, the deed must, nevertheless, be adjusted to the facts of the case, and must contain apt and appropriate recitals in order that it may be *prima facie* evidence of such recitals. The deed must affirmatively show upon its face the amount of taxes, interest and costs due upon each tract.
4. **Equitable Estoppel: PURCHASE OF LAND.** One who has title to

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land and knows of it, but stands by and allows and encourages another in ignorance of such title, to contract for the purchase of the land from a third person in possession having color of title, will be estopped from setting up his title against the party so purchasing, and whom he has himself assisted in deceiving.

5. ———: EVIDENCE. Equitable estoppels may be given in evidence and operate as effectually as technical estoppels.

Appeal from Sullivan Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED.

The following is the third declaration of law, asked by defendant and refused by the court, referred to in the opinion:

“If the court, sitting as a jury, finds from the evidence that the plaintiff, prior to the purchase of the land by defendant from Hughes, had the deed for the land under which he now claims, and knew that the defendant was about to consummate his purchase of the land from Hughes, and purposely withheld or concealed from defendant the fact of his own claim of title to such land, or if plaintiff, by his acts, conduct, or conversation, induced defendant to believe that he had no claim of title to such land, and that defendant was thereby induced to make such purchase from Hughes as he did make, then the finding should be for the defendant.”

H. Lander and S. P. Huston for appellant.

(1) The judgment recited in the sheriff's deed was rendered by a court of general jurisdiction, and the recitals therein were *prima facie* evidence of the existence of the judgment. R. S. 1879, sec. 2392; *McCormick v. Fitzmorris*, 39 Mo. 24; *Ellis v. Jones*, 51 Mo. 180; *Huxley v. Harold*, 62 Mo. 516; *Samuels v. Shelton*, 48 Mo. 448. In such cases jurisdiction is presumed. Jurisdiction is presumed in proceedings of courts of general

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jurisdiction. Lawson on Presumptions, chap. 2, p. 27; *Hurley v. Harold*, 62 Mo. 516; *Schell v. Leland*, 45 Mo. 289; Freeman on Judg. (3 Ed.) sec. 124; *Galpin v. Page*, 18 Wall. 364; *Dingue v. Kearny*, 2 Mo. App. 515. Revised Statutes, section 6839, expressly makes the recital evidence in tax cases. (2) All acts by a court in the exercise of jurisdiction, no difference how erroneous, illegal, or even contrary to the very law by virtue of which it exists, are binding until reversed or annulled by an appellate court. This is the universal rule in ordinary cases. Freeman on Judg. (3 Ed.) sec. 135; *Latriella v. Dorleque*, 35 Mo. 233; *Perryman v. State*, 8 Mo. 208; *Bernecker v. Miller*, 44 Mo. 102; *Whitman v. Taylor*, 60 Mo. 351; *Castleman v. Relfe*, 50 Mo. 583; *Freeman v. Thompson*, 53 Mo. 183. The same rules apply to proceedings in a court of general jurisdiction in tax suits. *Wellshear v. Kelly*, 69 Mo. 343. The precise question here raised has been directly presented and passed upon by this court. *Gray v. Bowles*, 74 Mo. 419. Under a similar tax law in California, the exact question has been decided the same way. *Mayo v. Foley*, 40 Cal. 281; *Mayo v. Ah Loy*, 32 Cal. 477. (3) It was not necessary that the recital should show the amount of the judgment. *Wilhite v. Wilhite*, 53 Mo. 71. (4) The trial court erred in refusing defendant's third declaration of law presenting the question of estoppel. Bigelow on Estoppel (3 Ed.) 476; *Taylor v. Elliott*, 32 Mo. 172; *Huntsucker v. Clark*, 12 Mo. 333; *Rice v. Bunce*, 49 Mo. 231; *Pelkington v. Insurance Co.*, 55 Mo. 172.

A. W. Mullins for respondent.

(1) The land here in question is a part of the third tract mentioned and set forth in the judgment and deed. But, as to the third tract, and, indeed, as to all the tracts, except the first, no judgment was rendered as it affirmatively appears from the recitals in the deed. The rule of

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construction is general, and is applicable alike to judgments as well as to simple contracts and specialties that "general words of description may be modified and restricted by particular words following them." And if, therefore, the first recital should indicate that the judgment was intended to be against the four several tracts the subsequent specific recital shows that it was against the first tract only. Freeman on Judgments, sec. 155, p. 159; *Smith v. McCullough*, 104 U. S. 25, 28; Sedgwick on Stat. and Con. Law, 423; Jones on Chattel Mort., sec. 77; *Woodgate v. Fleet*, 44 N. Y. 1, 14; *People v. Johnson*, 38 N. Y. 63; Freeman on Ex., sec. 42. (2) The statute in regard to delinquent back taxes prescribes what the judgment, if against the defendant, shall contain. R. S., sec. 6838. And it is plain that each tract must bear its own burdens, and the judgment must specify the amount of taxes and interest against it and for what years. One tract cannot be sold to discharge the liabilities against another, nor can any tract of land under that statute be lawfully sold unless there is a judgment against it conforming to the statutory requirement. (3) The judgment recited in the sheriff's deed is void, or no judgment at all as to the land in question. It binds or bars no one, and all acts performed under it, and all claims flowing out of it are void. Freeman on Judg., sec. 117; Freeman on Ex., sec. 20; *Higgins v. Peltzer*, 49 Mo. 152; *Fithian v. Monks*, 43 Mo. 502. (4) The evidence offered by defendant did not justify the court in giving the declaration of law asked upon the question of estoppel *in pais*. It is not pretended by defendant that he was induced to make his purchase by anything that plaintiff said or did, or that defendant altered his condition in any respect by the alleged acts of the plaintiff. There was, therefore, no estoppel. Bigelow on Estoppel (3 Ed.) 484; *Burke v. Adams*, 80 Mo. 504, 513, 514; *Bales v. Perry*, 51 Mo. 449, 453; *Acton v. Dooley*, 74 Mo. 63, 67; *Spurlock v. Sproule*, 72 Mo. 503.

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SHERWOOD, J.—Plaintiff brought ejectment for a tract of land, the east half of northwest quarter, section two, township sixty-four, range nineteen, and on the trial he put in evidence a chain of legal title from the United States through mesne conveyances to himself. The claim of the defendant is based on a sale of the land for taxes, and, also, on the ground of estoppel. Two questions are, therefore, presented for consideration by the record. 1. Whether the trial court erred in holding that the sheriff's deed to Perkins, purporting to be based on a judgment for the sale of the land for back taxes, was void on its face in so far as it concerned the land in dispute. 2. Whether the court erred in refusing to give defendant's declaration of law on the question of estoppel.

I. As to the first point: The sheriff's deed to Perkins by its recitals, sets out that a judgment was rendered in favor of the state to the use of the collector "and against John Corbett, and against the real estate hereinafter described, for the sum of ——— dollars, for certain delinquent state, county and special taxes, and interest as hereinafter set forth, assessed and found by said court to be due upon the following described real estate, viz.:

Tract No.	Parts of Section.	Sec.	Twp.	Range.
1	North half, southwest, southeast,	1	64	19
	West half, northeast.....	2	64	19
	Northwest quarter.....	2	64	19
	Southwest, northeast.....	3	64	19

"And that the taxes and interest found due upon said real estate, and the years for which the same were assessed, are upon each of the above described tracts, as follows, viz.: Tract No. 1, for 1865, \$0.75; 1866, \$4; 1867, \$12.04; 1868, \$21.45; 1869, \$11.42; 1870, \$24.65;

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1871, \$25.35; 1872, \$22.71; 1873, \$23.16; 1874, \$25.44; 1875, \$20.34; 1876, \$14.54; tax, \$204.22; interest, \$10.21; total, \$214.43." And the deed further recites that "upon which judgment a special execution and order of sale was issued from the clerk's office of said court," and that under said execution the sheriff sold the said four tracts of land to C. E. Perkins, trustee, who paid therefor the aggregate sum of two hundred and ninety dollars.

The land here in question is a part of the *third* tract mentioned and set forth in said judgment and deed. But as to said third tract, and, indeed, as to all the tracts, except the first, no judgment was rendered as it affirmatively appears from the recitals in the deed. It is at first stated that judgment was rendered "against the real estate hereinafter described for the sum of ——— dollars." The recitals then specify that "the taxes and interest found due upon said real estate and the years for which the same were assessed, are upon each of the above described tracts as follows, viz." etc. Then follows the amounts and the respective years that taxes were found and adjudged to be due against said tract number one, but nothing appears against the other tracts, or either of them.

The rule is well settled that "general words of description may be modified and restricted by particular words following them." Jones on Chat. Mort., sec. 377; *Smith v. McCullough*, 104 U. S. 25; Freeman on Judg., sec. 155. Here, it will be observed, that according to the express recital and particular words in the sheriff's deed, the taxes and interest for certain years were only assessed against but one tract, to-wit: "*Tract No. 1.*" And as the tract belonging to plaintiff was not embraced within that description, it follows as the general words are controlled by the particular words that no valid judgment appears by the face of the deed to have been rendered for taxes against the tract in controversy.

But, further, should we attempt to rely on the general words in the beginning of the deed that reliance

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would be vain, for the amount of the judgment against the tract in litigation is not set forth. It is true that under the statute, by virtue whereof the sale was made, no form of deed is prescribed (sec. 6839), yet the deed must contain apt and appropriate recitals in order that it may be *prima facie* evidence of such recitals. "No form being prescribed, the form must be adjusted to the facts of the case." *Einstein v. Gay*, 45 Mo. 62. And section 6838 requires that, "The judgment, if against the defendant, shall describe the land upon which taxes are found to be due, shall state the amount of taxes and interest found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the state be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interests and costs, be sold, and a special *feri facias* shall be issued thereon." This shows plainly enough what the judgment should contain, and the deed should show upon its face, and affirmatively show the amount of taxes, interest and costs, due upon each tract. Unless the deed does this, it does not properly refer to the power under which the sheriff assumed to act. So that, although no form for the deed is prescribed by the statute, yet, as it must, even in such cases, recite the power under which it is made (Blackwell on Tax Title, sec. 5, p. 406), and as the "form must be adjusted to the facts in each case," it must follow that the circuit court did not err in holding the deed void. The case of *Gray v. Bowles*, 74 Mo. 419, is totally unlike this one in its facts, and, therefore, the principle there announced has no application here.

II. In regard to the question of estoppel: Defendant next introduced evidence tending to show that he bought the land for a full price, in good faith, without any notice of any adverse claim or title, also tending to show that at the time when defendant was about to consummate the purchase of the land from Hughes, and before the money was paid or the deed delivered (the

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contract being verbal), the plaintiff then held the deed from Davis to himself in his pocket unrecorded, and did not inform defendant of any claim he had to the land, but told defendant that he, plaintiff, would like to rent the land from him, defendant; that defendant did not then know that plaintiff set up any claim to the land; that plaintiff knew that the money had not been paid or the deed delivered on the evening of the twenty-sixth of April, 1882, and that defendant intended to consummate the trade the next day, but said nothing about having the deed from Davis. Upon this evidence the point to be determined is whether an equitable estoppel has arisen in this cause. Lord Denman, who had delivered the opinion in the earlier case of *Pickard v. Sears*, 6 Ad. & E. 469, when he came to deliver the opinion in the later one of *Gregg v. Wells*, 10 Ad. & E. 98, stated that the doctrine in the former case might be stated even more broadly than it was there laid down: "A party," said he, "who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

In *Niren v. Belknap*, 2 Johns. 588, which was a bill in equity regarding land, Thompson, J., said: "There is an implied, as well as an express assent: As where a man who has a title, and knows of it, and stands by and either encourages or does not forbid the purchase, he and all claiming under him shall be bound by such purchase. 1 Forb. 161. It is very justly and forcibly observed by a writer on this subject [Roberts, 130] that there is a negative fraud in imposing a false impression on another by silence, where silence is treacherously expressive. In equity, therefore, where a man has been silent, when in conscience, he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent."

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Treating on this subject, Judge Story says: "In many cases a man may innocently be silent, for, as has often been observed, '*Aliud est tacere, aliud celare.*' But in other cases a man is bound to speak out, and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction," and, after giving instances of a man standing by and encouraging, or not forbidding, a sale of his property, or sees another person selling his land as grantor, and signs the deed made as a witness, the learned author, after stating the invalidating effect of such conduct on the title of the party guilty thereof, concludes by saying: "For in cases where one of two innocent persons must suffer a loss, and *a fortiori*, in cases where one has misled the other, he who is the cause or occasion of that confidence by which the loss has been caused or occasioned ought to bear it. Indeed, cases of this sort are viewed with so much disfavor by courts of equity, that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentation." 1 Story Eq. Jur. [13 Ed.] secs. 385, 387.

The same principle is forcibly asserted in *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, where no statements were made, no active inducements held out, nor encouragement given by the defendant who was grantee in the deed under which he claimed, but the grantor remained in possession, and from time to time sold portions of the land and improvements thereon were made in full view of the defendant's residence, some of the purchasers being known to the defendant; and Chancellor Kent, when commenting on this state of facts and the acts of defendant, said: "He preserved a studied silence, and gave no notice to those purchasers, or to the world, of his title. After this, he cannot be permitted to start up with a secret deed, * * * and take the land from *bona fide* purchasers under the testator. Having, for such a length

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of time, suffered the public to deal with the testator as the real owner, he cannot now be permitted to question or disturb any title which has thus been procured by his tacit assent. There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice and his conscience is bound by this equitable estoppel. *Qui tacet, consentire videtur. Qui potest et debet retare, jubet.*"

In a later case the doctrine of the one just cited was reaffirmed, the learned chancellor remarking: "Where one having title acquiesces, knowingly and freely, in the disposition of his property for a valuable consideration, by a person pretending to title, and having color of title, he shall be bound by that disposition of the property. * * * It is deemed an act of fraud for a party, cognizant all the time of his own right, to suffer another party, ignorant of that right, to go on, under that ignorance, and purchase the property, or expend money in making improvements upon it." *Storrs v. Barker*, 6 Johns. Ch. 166.

In the case at bar, the tax deed made in October, 1878, was put on record January 1, 1879, since which time Perkins, the grantee therein, and Hughes, his grantee, under deed dated January 31, 1882, have made valuable and lasting improvements on the land which was "wild, vacant, and unimproved," and Hughes was, at the time of defendant's purchase, in possession of the land with color of title. The plaintiff's deed (which is the second one in a series of mesne conveyances from Corbett, the original patentee, his patent bearing date in 1859, and recorded June 10, 1876), is dated April 20,

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1882, recites a consideration of seventy-five dollars, and was not put to record till April 28, 1882, the same day on which defendant's deed of April 27, 1882, was recorded, while the deed from Davis, the immediate grantor of plaintiff, bearing date June 20, 1866, was not recorded till after the commencement of this suit. Looking into the record then, Perkins, in consequence of his recorded deed, possession, and improvements made, had become the apparent owner of Corbett's title, and by like circumstances, Hughes had become the successor to the title thus apparently acquired. In this situation of affairs, the conversation between plaintiff and defendant, already recited, took place. Can it be doubted that had the plaintiff then and there taken his unrecorded deed from his pocket and exhibited it to defendant, that such act would have prevented the defendant from purchasing? Is not this an inference at once natural and irresistible? If it is, then the plaintiff is justly chargeable as one, in the language of Lord Denman, "who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict." If the plaintiff had been present the next day, when defendant's verbal contract with Hughes was consummated by purchase and deed, and had remained silent, there is no conflict in the authorities that this would have estopped him as against the title of the defendant then and thus acquired. And his standing by and saying nothing, would have been regarded, in such circumstances, as holding out tacit inducements, or encouragements, to the defendant to purchase, or else as being so culpably negligent that it would amount to the same thing.

Do the circumstances of this case materially differ in principle from the one supposed? Was it not equally obligatory on the plaintiff to speak in the real case as in the hypothetical one? It would seem if the evidence on the part of defendant is to be taken as true, that but one answer, and that in the affirmative, can be returned to

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this question. For "the estoppel may also arise, as we have intimated, from misleading silence or passive conduct joined with a duty to speak." Bigelow on Estoppel, 492. If the plaintiff had not been brought into *contact* with the defendant when about to act, he would have been under no obligation to seek defendant out and stop the intended purchase [*Id.* 503], but having engaged in conversation with him, having by terms of clear intimation indicated Hughes, the apparent owner, to be the real owner of the property, having failed to make known his own title, it would be unconscionable and inequitable now to permit him to assert and maintain that which he had theretofore tacitly and delusively denied. This doctrine of equitable estoppel lies at the foundation of morals; especially concerns conscience and equity; under its benign rule, entitled as it is, like other equitable doctrines, to a fair and liberal application, fraud is suppressed, and honesty and fair dealing promoted; conduct becomes equivalent to representations and acts to direct statements. Such estoppels may be given in evidence, and operate as effectually as technical estoppels; they cannot in the nature of things be subjected to fixed and settled rules of universal application like legal estoppels, nor hampered by the narrow confines of a technical formula. *Canal Co. v. Hathaway*, 8 Wend. 480; *Lucas v. Hart*, 5 Iowa, 415; *Preston v. Mann*, 25 Conn. 118; *Horn v. Cole*, 51 N. H. 287, and cases cited. The case last cited contains an admirable opinion by Perley, C. J., where the subject is discussed with distinguished ability, and the difference between legal and equitable estoppels pointed out with great clearness and force.

In conclusion, it only remains to say that the authorities, the equity and good conscience of this cause require that it be held that there was sufficient evidence to warrant the giving of the third declaration of law asked by defendant. And there was sufficient evidence to warrant

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a declaration on the subject of the plaintiff being estopped. In the discussion of this matter, I have reasoned on the theory that the evidence offered to support the third declaration of law is true, inasmuch as it stands uncontradicted. When this cause goes back the defendant, if so advised, may have his cause tried as one purely equitable, and thus have the principles of equity adapted to his defence more readily and with greater facility than where applied through the rigid media of declarations of law.

For the reasons given, the judgment should be reversed and the cause remanded. All concur.

THE STATE *ex rel.* ROBERTSON, *Appellant*, v. HOPE *et al.*

1. **Officer : ATTACHMENT : PRESUMPTION** Where, under a writ of attachment, directing a sheriff to levy on the property of the defendant therein, the officer seizes property in possession of a stranger to the writ, such seizure is *prima facie* wrongful as against such party in possession and in an action therefor by the latter against the officer on his bond, no presumption obtains in favor of the officer that he did his duty in making the levy.
2. ——— : ——— : ———. It is only where the controversy is between the officer and party to the writ that such presumption exists.
3. **Personal Property : POSSESSION OF.** Possession of personal property is presumptive evidence of title.

Appeal from Jackson Circuit Court.—HON. TURNER
A. GILL, Judge.

REVERSED.

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Karnes & Ess for appellant.

(1) It is undisputed that at the time of the levy of the attachment writs the relator was in the sole possession of the property, therefore, *prima facie*, it belonged to him. Wharton on Evid., sec. 1331; Best on Evid., sec. 366; Greenlf. on Evid., sec. 34; *Wiseman v. Lynn*, 39 Ind. 259; *Vasline v. Wilding*, 45 Mo. 89; *Rubey v. Culbertson*, 35 Ia. 264; *Simpson v. Carleton*, 14 Gray, 506. (2) The burden was on the sheriff to show authority of law for taking the property from relator's possession; the presumption that public officers do their duty cannot supply proof of such facts. *Linbloom v. Ramsey*, 75 Ill. 246; *U. S. v. Ross*, 92 U. S. 281. (3) Schneider had a right to prefer relator as his debtor and the latter had a right to accept the preference. *State, etc., v. Lawrie*, 1 Mo. App. 370; *Forrester v. Moore*, 77 Mo. 651; *Thornton v. Tandy*, 39 Tex. 544; *Shelley v. Boothe*, 73 Mo. 74.

Gage, Ladd & Small for respondents.

(1) The seventh instruction given for respondents complained of is not erroneous; it simply placed the burden of proof on the plaintiff where it belonged. *Heineman v. Heard*, 62 N. Y. 448; *Rowan v. Lamb*, 4 G. Greene (Ia.) 468. (2) The plaintiff tried his case on the theory that he occupied the position of a *bona fide* purchaser and he is estopped now to deny his theory below. *Harris v. Hays*, 53 Mo. 96. (3) Relator's possession was presumptive of collusion in Schneider's acknowledged fraud and the burden was on him to prove that he bought in good and faith for value. Possession is not always evidence of honest ownership. *Hamilton v. Marks*, 63 Mo. 167; *Cass Co. v. Green*, 66 Mo. 498; *Johnson v. McMurray*, 72 Mo. 278; *Carrier v. Cameron*, 31 Mich. 379; *Savage v. Hazard*, 9 N. W. Rep. 83.

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Coveyances by an insolvent of all his property are presumptively fraudulent. *Merrill v. Locke*, 41 N. H. 486.

Bryant & Holmes also for respondents.

(1) In all actions against a sheriff and his sureties when an attempt is made to charge them for his wrongful act or default, the presumption stated in the instruction complained of exists and is universally maintained. 1 Greenlf. on Evid., sec. 40; *Bruce v. Holden*, 21 Pick. 187; *Clarke v. Lyman*, 10 Pick. 45; *Weber v. Weber*, 1 Met. (Ky.) 18; *Anderson v. Sutton*, 2 Duv. (Ky.) 480; *Bannon v. Saunders*, 24 Gratt. 138; *Kelly v. Green*, 53 Pa. St. 302; *Phelps v. Ratcliff*, 3 Bush, 334; *Lea v. Polk*, 21 How. (U. S.) 493; *Burgert v. Borchert*, 59 Mo. 80; *Pickard v. Howe*, 12 Met. 198; *Barnard v. Graves*, 13 Met. 85. (2) The action is grounded on an alleged breach of that condition of the sheriff's bond whereby he and his sureties covenant that he "shall faithfully perform the duties of said office." No recovery can be had without alleging and proving the negative proposition that the sheriff in some particular did faithfully perform the duty of his office to the damage of the relator. Whatever is necessary for a complainant to allege even though it be a negative he must establish by proof. *Powers v. Russell*, 13 Pick. 69; *Nicholas v. Winfrey*, 79 Mo. 544; *Delano v. Bartlett*, 6 Cush. 364. (3) In an action against a sheriff for a false return the burden of proving the negative allegation of falsity devolves on the party asserting it. *Long v. Joplin Mining Co.*, 68 Mo. 422; *Central Bridge v. Butler*, 2 Gray, 130; *Nichols v. Munsel*, 115 Mass. 567.

RAY, J.—This is a suit in the name of the state at the relation of Robertson against defendant, Hope, and the co-defendants as his sureties on his official bond

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as sheriff of Jackson county, Missouri. The relator says in his petition that on July 15, 1882, he was the owner of and in possession of a stock of goods in Kansas City, Missouri, giving the items thereof, of the value of \$17,473.26; that the defendant, Hope, was then the sheriff of Jackson county, Missouri, and the other defendants were his sureties on his official bond; that on said date said Hope had certain writs of attachment in his hands directing him to attach the property of one Samuel Schneider, and that claiming to act under said writs, he seized and carried away said property of relator. The prayer is for the penalty of the bond and assessment of damages. The defendants' joint answer is a general denial.

The plaintiff's evidence tends to show that on July 12, Samuel Schneider, who was a wholesale liquor merchant in Kansas City, turned over to plaintiff in payment of a debt of about equal amount due from him to plaintiff, and in further consideration that Robertson should assume a debt of twelve hundred dollars due from Schneider to one Rice, the entire stock of goods, fixtures, etc., in his store in Kansas City, Missouri, and invoiced at the sum of seventeen thousand dollars; that under such sale and transfer, relator took immediate and exclusive possession of said stock of goods in said storeroom, locked said storeroom and kept the key thereof; that his debt was actual and *bona fide*, and that he took the goods in payment thereof, in good faith and for that and for no other purpose, and that on July 14, said sheriff, claiming to act under certain writs of attachment issued of that date by the circuit court of Jackson county, in favor of certain other creditors and against said Schneider, forcibly broke open the storeroom and seized and carried away said stock of goods as the property of said Schneider. Defendants' evidence tended to show that at the date of sale and transfer of said property to the relator, Schneider was insolvent,

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owing some seventy-five thousand dollars or eighty thousand dollars ; that this stock of goods was all of his visible and available assets, that the plaintiffs in the attachment writs, levied upon the property, were creditors of Schneider's and their claims amounted to twenty thousand dollars ; that Schneider, in the disposition of this and other property committed gross fraud upon his creditors with intent to defraud, hinder and delay them, that Robertson, the relator, was aiding and abetting him therein, and that Schneider was not indebted to him and that his claim in this behalf was not *bona fide*, but mere pretense. The evidence on the part of defendants further shows an intent on the part of said Schneider to cheat, defraud, hinder and delay his creditors in his disposition and concealment of his property. Under the instructions given in the cause the jury found for the defendants.

There are no questions arising upon the record in this case as to the action of the court in the admission or exclusion of evidence. The grounds urged here for reversal grow out of the court's action in giving instructions, indeed the material question involves the propriety of a single instruction, the seventh given for defendant and which is as follows :

"The jury are instructed that the law presumes that the defendant, Hope, as sheriff of Jackson county did his duty in levying the writs of attachment on the goods in controversy, which presumption the jury must take into consideration in making a verdict ; and before the jury can find for the plaintiff, the relator Robertson must overcome that presumption by a preponderance of the testimony."

Where the controversy is between the officer and parties to the writ, the presumption mentioned usually exists in favor of the officer. In actions against officers, for false returns, this presumption has often been invoked. But a writ which authorizes and commands

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an officer to seize the property of one party, does not authorize him to levy upon the property of another and which he has in his possession. Gwyne on Sheriffs, 258; *Commonwealth v. Kennard*, 8 Pick. 133; *State ex rel. O'Bryan v. Kontz et al.*, 83 Mo. 323. Possession of personal property is presumptive evidence of title, and if with a writ running solely against the defendant therein, the officer makes a seizure of property in the actual possession of a stranger to the writ, the law makes no presumption in his favor in this behalf. He acts at his peril in such case, and must assume the burden of rebutting the presumption of title which the possession of the property raises. Where the officer, in execution of the writ, seizes upon property in the actual possession of the defendant, then a presumption of this sort mentioned in the instruction exists in his favor in any action by the parties, or by a third party, or stranger claiming said property, and the law would indulge the same presumption in favor of the officer in the absence of evidence as to who had the actual possession. Such, we think, are some of the cases, to which we are referred.

In this case, as the evidence shows and as is conceded, Robertson, the relator, was at the date of the levy in the actual and exclusive possession of the stock of goods and the law presumed him to be the owner thereof. The writs which defendant Hope, had in his hands as sheriff ran against one, Samuel Schneider, and said writs authorized and commanded him to seize the property of said Schneider. Robertson was an entire stranger to said writs and a seizure of goods in his possession and to which he presumptively had title, without any precept against him or his property, was *prima facie* wrongful.

Prima facie the officer was a trespasser. *Linbloom v. Ramsey*, 75 Ill. 243; *Lammon v. Feusier*, 111 U. S. 17; *Day v. Gallup*, 2 Wall. 97; *Buck v. Colbath*, 3 Wall.

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334; Murfree on Official Bonds, sec. 303; *Ohio for use of Story v. Jennings et al.*, 4 Ohio St. 418. If, as is conceded, Robertson was in the actual and exclusive possession of the property, and if the law presumes that he was the owner from the fact of his possession and claim of ownership, and if defendant, Hope, as sheriff, levied thereon, under writs which ran against Schneider, and to which Robertson was a stranger, which is also conceded, then we think the law indulges no presumption in favor of the officer and that he did his duty in making said levy. The fact of Robertson's actual possession and claim of ownership of the property at the date of the levy was not assailed. His ownership thereof and right to the possession were assailed by the defendant at the trial, and this was the issue on trial before the jury. Upon that question, the evidence is conflicting, and the seventh instruction, which told the jury that the law presumed the officer did his duty in this behalf, that the jury must consider such presumption and that relator must overcome that presumption by a preponderance of the evidence, was, we think, erroneous, misleading and prejudicial to the relator.

We, therefore, reverse the judgment upon this ground, and remand the cause for further proceedings in conformity hereto. All concur.

DAVIS V. LAND *et al.*, Appellants.

1. **Homestead**: CONVEYANCE OF. No fraud can be perpetrated on creditors by any disposition a debtor may make of his homestead.
2. ———: ATTACHMENT. That a debtor is about to remove out of the state to change his domicile affords no ground for an attachment of his homestead property.

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Appeal from Barton Circuit Court.—HON. CHARLES
G. BURTON, Judge.

REVERSED.

Harding & Buller for appellants.

(1) Phillips was entitled to hold the lot in controversy as his homestead at the time of the attachment. Acts 1870, p. 16, sec. 1; *Hartwell v. McDonald*, 69 Ill. 297. (2) A homestead is not the subject of a fraudulent conveyance. *Vogler v. Montgomery*, 54 Mo. 383; *State ex rel. Meinzer v. Dixeling*, 66 Mo. 375; *Beck v. Ashbrook*, 59 Mo. 200; *Boggs v. Thompson*, 13 Neb. 303; *Aultman v. Rainey*, 59 Iowa, 654; *Smith v. Rumsey*, 33 Mich. 183; *Dawc v. Hurley*, 78 Ky. 266; *Cox v. Wilder*, 2 Dill. C. C. 46. (3) A conveyance of exempt property, even with intent to defraud is not fraudulent. *O'Connor v. Ward*, 60 Miss. 125; *Delashment v. Trim*, 44 Iowa, 613; *Winchester v. Gaddy*, 72 N. C. 115. (4) A gift or sale of property exempt from attachment or execution to a stranger or to the debtor's wife cannot be a fraud upon creditors. *Allen v. Berry*, 56 Wis. 178.

Robinson & Harkless and *Wm. Thompson* for respondent.

(1) The evidence shows that one of the grounds alleged in the affidavit for attachment was that defendants were about to move out of the state with intent to change their domicile; and this was sustained on plea in abatement upon trial had, and how the defendants can strain themselves out of this we are unable to see. *State ex rel. Schnerr v. Lais*, 46 Mo. 108; 1 W. S., p. 185, sec. 19; *Ib.* p. 697, sec. 1. (2) There can be no homestead claim for another reason. The testimony shows that Davis' cause of action accrued on November 11, 1875, and there is no

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claim that Phillips ever lived on the land or claimed it as a homestead until 1879; or that Phillips even owned the land at that time, or if he did that he ever had his deed on record. 1 W. S., p. 698, sec. 7. (3) The court has made a finding upon the facts as to the dismissal being fraudulent and without authority, and that Baker had full knowledge of the fraud and purchased with notice, and the evidence fully sustains it; and the cause should be affirmed.

HENRY, C. J.—This is a suit in ejectment to recover possession of lot 27 in James' addition to the town of Carthage. On his application Dermott was made a defendant, Land being in possession of the premises as his tenant. Their answer is a general denial. The cause was taken to the Barton circuit on a change of venue, and on a trial thereof plaintiff obtained a judgment from which defendants have appealed. Plaintiff claims title under attachment proceedings against Thomas Phillips, to whom the lot was conveyed by deed by one Maher, August 15, 1875, which was recorded on the nineteenth of the same month and year. Plaintiff's cause of action in the attachment suit accrued on the eleventh of November, 1875. When the attachment suit was instituted, but not when plaintiff's cause of action accrued, Phillips was living with his family on the premises and remained there until 1879. He had, however, sold it to Baker, his father-in-law, in 1877.

The grounds alleged for the attachment were that defendant Phillips had fraudulently conveyed and assigned his property and effects so as to hinder and delay his creditors, and was about to remove out of the state to change his domicile. The property in question was Phillip's homestead, which he acquired before plaintiff's cause of action accrued; and by the statute, section 2695, that was acquired when he filed his deed for record in the recorder's office. When the attachment

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suit was instituted, Phillips with his family occupied the premises as a homestead. It was subject to attachment and execution "upon all causes of action existing at the time of acquiring such homestead." No fraud upon creditors can be perpetrated by any disposition the debtor may see proper to make of his homestead. It is beyond their reach, both at law and in equity, and there can be no fraudulent disposal of such property within the meaning of the attachment law. Nor did the existence of an intent to remove afford any ground for an attachment against him, with respect to this property. Until such an intent culminates in the abandonment of the property by the owner of the homestead, the creditors have no concern or interest in it, and if before he removes he sells the property, as under the statute he may, they have no right to run an attachment or execution against it, no matter for what purpose or on what consideration he conveyed it.

It is unnecessary to consider the other questions discussed in briefs of counsel, since this is decisive of the controversy. The judgment of the circuit court is reversed. All concur.

DAVIS, *Trustee, Appellant*, v. BESSEHL.

1. **Deed of Trust, Construction of.** By the provisions of the deed of trust in this case, given to secure the payment of certificates of indebtedness issued by a bank, the liability of the grantor was only secondary, and the land conveyed could not be resorted to for the payment of the certificates, until all the assets of the bank capable of collection by reasonable diligence were collected and applied on said certificates, and, therefore, held that the trustee could not maintain ejectment for the land to the end that he might apply the rents in discharge of the debts, so long as the requirements of the deed

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of trust as to collecting and applying the assets, were not complied with.

2. **Trustee : EJECTMENT.** Whether a trustee in a deed of trust in the nature of a mortgage, like a mortgagee, can maintain ejectment not decided.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

James O. Broadhead and *Isaac H. Lionberger* for appellant.

(1) The deed of trust executed by E. B. Hudson, to secure the payment of the certificates of the Butchers' & Drovers' Bank, is a mortgage. *Hoffman v. Mackall*, 5 Ohio St. 130; *Woodruff v. Robb*, 19 Ohio St. 215; *Newman v. Samuels*, 17 Iowa, 534; Judge Dillon, 2 Am. Law Reg. 648; *Cusey v. Gibony*, 36 Mo. 320; *Johnston v. Houston*, 47 Mo. 227; *Masterson v. Ry.*, 72 Mo. 347; Jones on Mort., secs. 62, 1769; Perry on Trusts, sec. 602, *d* and *f*; 1 Wash. on Real Prop., 475, 483; 12 Mo. App. 497; 97 U. S. 68; 13 N. Y. 200; 15 Ill. 505; 21 Ill. 450. (2) After default in the payment of the certificates secured, the trustee was entitled to enter for breach of condition. (a) A mortgagee may enter after forfeiture. *Wallop v. McKinney*, 10 Mo. 230; *Meyer v. Campbell*, 12 Mo. 603; *Kennett v. Plummer*, 28 Mo. 142; *Sutton v. Mason*, 38 Mo. 120; *Hubble v. Vaughn*, 42 Mo. 138; 43 Mo. 98; 47 Mo. 227; 49 Mo. 126, 389; 51 Mo. 55; 53 Mo. 147. (b) A trustee may enter. *Johnston v. Houston*, 47 Mo. 227; *Masterson v. Ry.*, 72 Mo. 347; *Sherwood v. Saxton*, 63 Mo. 82; *Goode v. Comfort*, 39 Mo. 313; Jones on Mort., secs. 62, 1769; *Shaw v. Ry.*, 5 Gray, 162, 180; 1 Wash. Real Prop. *502; Perry's Trusts, sec. 602, *d, i, k, aa, gg*; *Brown v. Duc*, 10 Sm. & M. 268; Jones on Ry. Securities, secs. 357, 360; *Sturges v. Knapp*, 31 Vt. 1; *Hall v. Ry.*, 21 Law Rep. 138. (3) The restrictions

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upon the trustee's power to sell do not attach to his right of entry after forfeiture. Power of sale concurrent, not exclusive. *Thornton v. Pigg*, 24 Mo. 249; *Sav. Ass'n v. Mastin*, 61 Mo. 435; *Johnston v. Houston*, 47 Mo. 227; 1 Broom & H. Coms., 617; 1 Wash. on Real Prop. *501; Jones on Morts., ser. 1773; 2 Am. Law. Reg. 653, 717; 7 Ala. 823; 2 Chand. 105; 5 Gray, 162, 180; 36 Pa. St. 150; 21 Ala. 573; 2 Cowen C. C. 195; 5 Hump. 612; 10 Iowa, 408; 2 John. Ch. 25; 48 Miss. 444; 12 Mich. 180; 4 Mich. 447; 76 N. C. 378; 52 Texas, 326; 1 Wis. 420; 12 Conn. 449; 21 Wend. 273; 49 Me. 375; 39 Ark. 544. A restriction upon a power of sale will not attach to the concurrent rights or remedies. *Johnston v. Houston*, 47 Mo. 227; *Buller v. Ladue*, 12 Mich. 180; *Bradley v. Ry.*, 36 Pa. St. 150, note; *Shaw v. Ry.*, 5 Gray, 162, 180. (4) A tenant is in no better position than a mortgagor. 2 Coke *36, Butler's note 2; 2 Wash. on Real Prop. *226; 4 Kent, *164, *165; *Moss v. Gillmore*, 1 T. R. 384; 2 Ves. & B. 252.

Madill & Ralston for respondent.

(1) The action being ejectment the burden of proof was on plaintiff to show both legal title to the premises, and the right of possession as against defendant. Malone on Real Prop. Trials, 98; *Kimbrough v. Benton*, 3 Humph. 129; *Ford v. French*, 72 Mo. 250; *Norfleet v. Russell*, 64 Mo. 176. (2) Plaintiff does not own or hold the legal estate conveyed by Mrs. Hudson's deed of trust to James G. Barry. There was no provision in the deed for the appointment of a new trustee in case of the death of Barry, and the power of the latter was extinguished by his death. Hill on Trustees (2 Am. Ed.) 301, 211; 2 Perry on Trusts (3 Ed.) 355; *Whitlsey v. Hughes*, 39 Mo. 13; *Graham v. King*, 50 Mo. 22. A new trustee does not take the legal title until the conveyance of the same to him by the former trustee, or by some person ap-

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pointed by the court. *O'Keefe v. Callthrop*, 1 Atk. 18; *Young v. Young*, 4 Cranch, C. C. 499; Hill on Trustees (2 Am. Ed.) 274-5, *et seq.* (3) There has been no default which entitles the plaintiff to enter. *Martin v. Paxon*, 66 Mo. 260; *Tracy v. Gravois Ry.*, 13 Mo. App. 295; *St. Louis, etc., v. Ry.*, 69 Mo. 65. (4) The agreed statement of facts shows that all the amounts due from the stockholders of the Butchers' & Drovers' Bank of St. Louis have not yet been either collected or applied to the payment of the certificates of indebtedness of said bank, as provided in the deed of trust, which, by its express terms, makes the collection and application of these amounts to the payment of the said certificates a condition precedent to any sale of this property by the trustee. This condition precedent not having yet been fulfilled, it is clear that the trustee could not now make any valid or legal sale and conveyance of this property under the power of sale contained in the deed of trust. *Roarty v. Mitchell*, 7 Gray (Mass.) 243; 1 Hilliard on Mortgages, p. 132, sec. 4. Such sales if now made by the trustee, would be simply void, both at law and in equity, and would pass no title to the vendee, which would enable him to maintain an action of ejectment for this property. *Eitelgeorge v. Building Association*, 69 Mo. 52; *Long v. Long*, 79 Mo. 644, 51, 52; *Koehring v. Muemminghoff*, 61 Mo. 403; Hill on Trustees [2 Ed.] *478, p. 698 and note; Sugden on Powers [6 Ed.] 497. The debt secured by the deed cannot be ascertained in amount until the amounts due from the stockholders of the bank are collected or found to be uncollectible; and any attempted sale by the trustee would be enjoined until the amount of the debt should be ascertained by an accounting in equity; or some other proper manner. *Wilkins v. Gordon and wife*, 11 Leigh, 547. (5) And for the same reasons above set forth, neither the trustee nor the scrip holders of the Butchers' & Drovers' Bank, can now maintain a bill for the foreclosure of the

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deed of trust, and the appointment of a receiver on the ground that there had been default in the payment of the scrip, and that the property is inadequate to secure its payment. *Butchers' & Drovers' Bk. v. The Bank et al.*, 14 Mo. App. 597; *Building Ass'n v. Platt*, 5 Duer, 675; *Masterson v. Ry.*, 72 Mo. 347; *Meyer v. Estell*, 48 Miss. 401. (6) Mrs. Hudson was a voluntary surety for the bank, and as such entitled to stand on the strict construction and letter of her contract. Brandt on Suretyship, sec. 21; 1 Jones on Mortgages, secs. 113-4; *Wilcox v. Todd*, 64 Mo. 338; *John v. Reardon*, 11 Md. 465.

BLACK, J.—On the first of August, 1877, Eliza B. Hudson made a deed of trust conveying the improved real estate here in question to Barry to secure certain debts. On the death of Barry, the plaintiff was appointed successor in the trust and brings this suit of ejectment to the end that he may apply the rents in discharge of the debts. The defendant is the tenant of Mrs. Hudson. The deed recites that the Butchers' & Drovers' Bank, which was then unable to meet its obligations, had made a proposition to its creditors to pay five per cent. in cash and to issue certificates of indebtedness for the balance due to them, the contents and form of which certificates are given showing that they were to be due and payable on or before the first of August, 1880, and had as security the assets of the bank amounting to seven hundred and fifty thousand dollars, and would be secured by deeds of trust on property of E. B. Hudson, M. F. Smith and M. C. Chambers, valued at two hundred and fifty thousand dollars. The proposition also states that the certificates would be received for debts due to the bank. Further provisions of the proposition will be hereafter noticed.

The deed then recites that a "sufficient number" of the creditors had accepted the proposition "so that the said Eliza B. Hudson deems it safe to execute the said

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instrument which is therein proposed to be executed by her," and that the bank had executed its certificates to the amount of six hundred and fifty thousand dollars. The property is then conveyed to Barry "upon the following trusts, and no others, to-wit: First, if said certificates of indebtedness above mentioned, issued or to be issued, shall well and truly be paid and satisfied by said Butchers' and Drovers' Bank of St. Louis, on or before the first day of August, eighteen hundred and eighty, then this deed shall be void, and the same shall be released by said trustee, at the costs of said party of the first part; but if

"Secondly: the said Butchers' & Drovers' Bank of St. Louis shall not, on or before the said first day of August, eighteen hundred and eighty, have paid, satisfied, taken up or extinguished the said certificates, and each and every one of them, *then said trustee may, at the request of the holders of said certificates, or any of them remaining unpaid, proceed to sell the said real estate above herein described, or any part or parcel thereof, at the east door,*" etc., "*provided, however, that before the said trustee shall be authorized, under the power herein given to proceed to advertise and sell the whole, or any of the above described property, all the assets of said bank which can fairly and reasonably be considered as collectable, shall first have been collected and applied to the payment of said certificates, or sold for, or received in payment of such assets, and all the amounts that are owing by, or collectible from, the stockholders of said bank, and that can, by reasonable diligence, be collected, shall have been first collected and applied to said certificates.*"

The certificates were not paid on the first of August, 1880, nor were they paid in 1882, when this suit was commenced.

1. The admitted facts are that at the commencement of this suit there remained a considerable portion

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of the assets of the bank, due from stockholders and others, which were fairly and reasonably considered collectible, and which had not been collected or applied in payment of the certificates. It must, therefore, be, and is agreed on all hands that the trustee could not sell under the terms of the deed; for it will be seen he can only sell when all the assets which are fairly and reasonably considered collectible shall have been collected and applied, etc. The claim on the part of the appellant, however, is that these restrictions relate only to the power of sale; that they are to be regarded in the execution of that power, but do not attach to or affect any other remedy. Conceding, for the present, that a trustee, like a mortgagee, may recover in ejectment upon and after default, the question then is, has there been a default? Now it is to be borne in mind that on the face of this deed Mrs. Hudson is not the debtor. The bank is the debtor. It is also admitted that she was not a debtor or creditor of the bank, and sustained no relation to these creditors or the bank, except that created by the deed. The bank, by the proposition of settlement, recited in full in the deed, professed to her and the creditors to owe \$686,336, and to have seven hundred and fifty thousand dollars of assets, which are made to stand as security for the payment of the certificates. The certificates are made receivable for any indebtedness of the bank, and in payment of the property sold by it. A quarterly statement is to be made to a committee of the depositors accepting the proposition; and the further agreement contained in this scheme of settlement is that the property will be sold and debts collected as fast as practicable. From all this we can but conclude the assets of the bank are to be, and were by the parties regarded as the primary fund out of which the certificates were to be paid. Mrs. Hudson is not liable on these certificates, detached from the deed of trust. There is no remedy as against her except upon the deed of trust.

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The forfeiture as to her is to be determined by the deed. That a power of sale in a mortgage or deed of trust may be so limited that a sale under the power cannot be made, and yet there be a remedy by foreclosure must be conceded. That was the case in *Butler v. Ladue*, 12 Mich. 178.

Mrs. Hudson stands in the attitude of a surety for the bank, and her undertaking is to be interpreted in the light of the proposed scheme as it is set out and detailed in the deed. Looking at the deed as a whole, and giving effect to all of its parts we hold her liability is secondary only, and that this property cannot be resorted to for the payment of the certificates until the assets of the bank, which can by reasonable diligence be collected, are collected and applied. Until then there will be no default and hence there was no forfeiture on the first of August, 1880. It is clear that until then no active duties are devolved upon this trustee. The fact that the assets are not now sufficient to pay all of the certificates cannot change the result reached. The parties, as we construe the deed, have made it a security for so much of the certificates as shall remain unpaid after the assets of the bank shall have been reasonably and fairly exhausted. We are all agreed as to what has been said. The powers of a trustee are certainly, for the most part, fixed by the stipulations in the deed, and not by law. Whether a trustee in these deeds of trust in the nature of a mortgage, like a mortgagee, can maintain ejectment, is not now decided and need not be to a proper disposition of this cause. All concur.

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LIONBERGER V. BAKER *et al.*, *Appellants*.

1. **Voluntary Conveyance: FRAUD OF CREDITORS.** Where a debtor in embarrassed circumstances, makes a voluntary conveyance and is afterwards unable to meet his debts, existing at the time of the conveyance, in the ordinary course prescribed by law, the conveyance will be void as to such existing debts.
2. **Deed: COLORABLE CONSIDERATION.** A consideration for a conveyance by such debtor wholly disproportionate to the value of the property conveyed and paid to give color to the transaction is not a valuable consideration.
3. **Marriage.** Marriage is doubtless a valuable, as distinguished from a good consideration.
4. **Innocent Purchaser.** A purchaser from a fraudulent grantee for a valuable consideration without notice takes a good title.
5. **Voluntary Conveyance: MARRIAGE: CONSIDERATION.** One marrying the grantee in a voluntary conveyance because of its provisions is regarded, it seems, as a purchaser for value. Such, however, is not the case with one who has only contracted or engaged to marry such grantee.
6. **Lis Pendens.** Where one marries the grantee in such conveyance after a suit has been commenced to set aside the deed because fraudulent as to creditors, he takes subject to the result of the suits.
7. **Conveyance in Fraud of Creditors: REMEDIES OF CREDITOR.** A judgment creditor has the option of either first bringing suit to set aside the fraudulent deed of his debtor and then selling under execution the latter's interest ascertained by the suit, or the creditor may first sell under execution and the purchaser may set aside the fraudulent deed.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

W. H. Clopton, F. F. Espenschied and G. D. Bantz
for appellants.

(1) Davis took an assignment of the interest the

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Fourth National Bank had in the suit in equity to charge the property with the judgment. He also took an assignment of the judgment, but it was all one transaction, the same consideration transferred to him both rights, *i. e.*, the suit then pending and the right to levy the execution. The mere right to file or to prosecute a bill in chancery on the ground of fraud cannot be assigned even in equity. *Bispham Eq.*, sec. 166; 2 Story's *Eq.*, 1040; *Delloughton v. Money Law*, 2 Chan. App. 169; *Smith v. Harris*, 43 Mo. 557; *Wallen v. Railroad*, 74 Mo. 522; *Railroad v. Railroad*, 20 Wis. 183; *Prosser v. Edmonds*, 1 You. and Cal. 481, 499; *French v. Shotwell*, 5 John. Ch. 566; *McMahon v. Allen*, 34 Barb. 56. The last case construes New York statute like ours. R. S., sec. 3462; *Gardner v. Adams*, 12 Wend. 297; *Marshal v. Means*, 12 Ga. 61; *Wilhite v. Roberts*, 4 Dana, 172. (2) The court erred in admitting proof of any conversations with John Baker by witness, Simon, after the delivery of the deed to Jessie G. L. Baker, and of facts transpiring after the deed to her. As against her, the testimony is clearly incompetent. *Boyd v. Jones*, 60 Mo. 454. (3) The court erred in admitting the alias execution, levy, advertisement and sheriff's deed. When the interest of an heir is to be sold, the quantity of the interest should be stated and the number of the heirs given. *Gales v. Christy*, 4 La. An. 295; *Diamond v. Coutney*, 12 La. An. 251. Not only the description of the property, but the defendant's interest should also be given. *Erans v. Ashly*, 8 Mo. 177; *Henry v. Mitchell*, 32 Mo. 512. (4) If a valuable consideration was given for the deed charged to be fraudulent, no matter how trivial, if the purchaser is free from the knowledge of fraudulent intent the conveyance is good. *Shultz v. Brown*, 27 Pa. 123; *Dygert v. Remershire*, 32 N. Y. 629; s. c., 39 Barb. 417; *Seward v. Jackson*, 8 Cow. 430; R. S., 1879, sec. 2502. The plaintiff failed to prove that the conveyance was voluntary, or that the daughter of John Baker was

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party to any fraudulent intent, or that the latter was insolvent at the date of the conveyance. (5) Even where the consideration is grossly inadequate and the conveyance is for that reason regarded as partially voluntary and to that extent constructively fraudulent, the grantee not only has the legal title but also priority in equity over the grantor's creditors to the extent of the consideration and for that purpose equity treats the conveyance as a security. *McMeekin v. Edmonds*, 1 Hill Ch. 288; *Van Wyck v. Baker*, 16 Hun, 169; *Gordon v. Tweedy*, 71 Ala. 213; *Patrick v. Patrick*, 77 Ill. 539; *Staney v. Laning*, 58 Ia. 662. (6) A sale under execution does not deprive the original grantee of these equities. *Boyd v. Dunlap*, 1 John. Ch. 478. A purchaser of an equitable title takes subject to the equities of the person holding the legal title. *Jasper Co. v. Jarvis*, 76 Mo. 13; *Mann v. Best*, 62 Mo. 491. Lionberger took with notice of the foregoing equities and subject to them. *Wallace v. Wilson*, 30 Mo. 335; *Rhodes v. Outcalt*, 48 Mo. 367. (7) The sheriff's sale was inoperative because there was no interest or estate in lands to be sold on execution. Freeman on Executions, sec. 187; Lewin on Trusts, 547; *McIlvane v. Smith*, 42 Mo. 45; *Doe v. Greenhill*, 3 Barn. & Ald. 690; *Rogers v. Cary*, 47 Mo. 232. (8) Plaintiff's remedy after the sheriff's sale was ejectment on the death of the life tenant. Bump Fraud. Convey. 529; *Smith v. Cockrell*, 66 Ala. 82; *Crauson v. Smith*, 47 Mich. 190. Although a creditor may before sale on execution, bring his bill to aid the execution and remove embarrassments to such sale (*Zoll v. Soper*, 75 Mo. 460; *Kerr v. Kerr*, 6 Lea. 225), but after sale on execution, the bill will not lie as a bill to remove a cloud and cannot be maintained by one not in possession. *Herrington v. Williams*, 31 Tex. 448; *Lake Road v. Bedford*, 3 Nev. 399; *Orton v. Smith*, 18 How. U. S. 363; *Polk v. Pendleton*, 31 Md. 118. (9) John D.

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Davis was a subsequent purchaser within the meaning of Revised Statutes, section 2498. *McNeil v. Turner*, 16 Wall. 352; *Block v. Long*, 60 Mo. 181. (10) Conceding that the conveyance from John to Jessie G. L. Baker was purely voluntary, the subsequent marriage of the grantee converts the grant into one for valuable consideration. *Story v. Arden*, 1 John. Ch. 261, 271; On Error, 12 John Ch. 536; *Wood v. Jackson*, 8 Wend. 33; *Huston v. Cantrell*, 11 Leigh, 137; *Bently v. Harris*, 2 Grat. 357; *Pradgers v. Laugham*, 1 Siderfins, 133; *East India Co. v. Clavell*, Prec. in Ch. 380, 381; *Brown v. Carter*, 5 Vesey, 879; Newland on Contracts, 404; Sugden on Vendors, 436, 437; *Prescill v. Wilson*, 102 U. S. 22.

John D. Davis for respondent.

(1) If a debtor is in embarrassed circumstances and makes a voluntary conveyance, and is afterwards unable to meet his debts owing at the time of making the deed, in the ordinary course prescribed by law for their collection, or is reduced to such a condition that an execution against him would be unavailing, such conveyance is fraudulent and void as to those debts and the property conveyed is subject to their payment. *Potter v. McDowell*, 31 Mo. 62; *Eddy v. Baldwin*, 32 Mo. 369; *Howe v. Waysman*, 12 Mo. 169; *Woodson v. Pool*, 19 Mo. 340; *Pawley v. Vogel*, 42 Mo. 291; *Reppey v. Reppey*, 46 Mo. 571; *Henderson v. Dickey*, 50 Mo. 161; *Bobb v. Woodward*, 50 Mo. 95; *Patten v. Casey*, 57 Mo. 118; *Fisher v. Lewis*, 69 Mo. 629; Bump on Fraud. Con. [1 Ed.] 293, 296, 299. "Solvency consists not only in the present ability of the debtor to pay his debts, but in such a condition of his means that payment can be enforced by process of law." *Eddy v. Baldwin*, 32 Mo. 369. (2) The payment of a nominal consideration does not entitle the grantee to be regarded as a purchaser for value. *Kuykendall v. McDonald*, 15 Mo. 416; *Fisher*

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v. Lewis, 69 Mo. 629; *Davidson v. Little*, 22 Pa. St. 252. (3) Gross inadequacy in the price paid for land is a badge of fraud. *Robinson v. Robards*, 15 Mo. 459; *Curd v. Lackland*, 49 Mo. 451; *Ames v. Gilmore*, 59 Mo. 537. (4) Where a party takes a conveyance for an expressed consideration and afterwards to set up the same conveyance as a gift, the court may set it aside on that ground. *Galbreath v. Cook*, 30 Ark. 417; *Cadwallader v. West*, 48 Mo. 483. (5) The burden of proof rests on the grantee in case of a voluntary conveyance to prove that the grantor was solvent and not embarrassed at the time of the conveyance. *Lane v. Kingsberry*, 11 Mo. 402; *Grimes v. Russell*, 45 Mo. 431. (6) A conveyance without consideration or merely for love and affection made by an insolvent is void as against creditors, though the grantee was ignorant of the insolvency and innocent of the fraud. *Gamble v. Johnson*, 9 Mo. 605; *White v. McPheeters*, 75 Mo. 286; *Hurley v. Taylor*, 78 Mo. 238; *Bohannon v. Combs*, 79 Mo. 305. (7) The purchaser at an execution sale occupies as advantageous a position as though he were a creditor in a proceeding to set aside the conveyance for fraud. *Bobb v. Woodward*, 50 Mo. 95; *Ryland v. Callison*, 54 Mo. 513; *Zoll v. Soper*, 75 Mo. 460. And is entitled to a decree vesting the title to the land in him, and cannot be compelled to accept the amount of the judgment with all costs and expenses in lieu of the land. *Allen v. Berry*, 50 Mo. 90; *Kinealy v. Macklin*, 2 Mo. App. 241. (8) A proceeding in equity to have a fraudulent deed annulled will be sustained even though the plaintiff is not in possession of the land, recourse being necessary to extrinsic evidence to establish the fraud. *Beedle v. Mead*, 81 Mo. 297; *Moore v. Wingate*, 53 Mo. 398-4; *Bobb v. Woodward*, 50 Mo. 95, 101. In the case at bar, neither party is in possession or entitled to possession, as there is an outstanding life estate. An objection to a proceeding in equity, that there is an adequate remedy at law, cannot

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avail to reverse the decree, if made for the first time on appeal. *Whetstone v. Shaw*, 70 Mo. 575; *Hemann v. Skrainka*, 14 Mo. App. 577; *Walker v. Owen*, 79 Mo. 563. (9) Errors alleged to have occurred at the trial below, but not mentioned in the motion for a new trial, will not be considered in the appellate court. *Griffin v. Regan*, 79 Mo. 73. (10) Under the well established practice in this state a creditor has his election to either (a) file a creditor's bill to charge property fraudulently conveyed with the payment of his debt, or (b) to sell under execution the interest of the debtor and then file his bill to annul the fraudulent deed. To proceed in the latter way by sale under execution is the usual course, and has received the sanction of this court in so many cases that it has become a well established rule of real property and the foundation of unnumbered titles. *Bobb v. Woodward*, 50 Mo. 95, 101; *Ryland v. Callison*, 54 Mo. 513; *Zoll v. Soper*, 75 Mo. 460. (11) In an equity case where the trial court has the witnesses personally before it and there is abundant evidence to sustain its finding of facts, the Supreme Court will not interfere and reverse such findings unless it is clear it should have been otherwise. *Erskine v. Lowenstein*, 82 Mo. 301; *Judy v. Bank*, 81 Mo. 404; *Parke v. Thompson*, 81 Mo. 565; *Royce v. Jones*, 78 Mo. 403; *Chapman v. McIlwrath*, 77 Mo. 39.

BLACK, J.—This is a suit to set aside a deed made by John Baker to his daughter, Jessie G. L. Baker, now Mrs. Antidel, dated July 19, 1878, conveying to her a one thirty-sixth of certain real estate in the city of St. Louis. The Fourth National Bank recovered judgment against John Baker in January, 1879, for over five thousand dollars upon notes dated in December, 1876, and June, 1877. John D. Davis purchased the judgment and under an execution issued thereon became the purchaser of the property in the name of the plaintiff.

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The deed from Baker to his daughter, it is alleged, was voluntary, and, to her knowledge, made to defraud the creditors of John Baker. It will be seen the debts due to the bank were created anterior to the date of the deed which plaintiff seeks to set aside. It is shown that Mr. Baker had at that time a large amount of property in the city of St. Louis, which some of the witnesses estimated to be of the value all in all, as high as \$156,000. He was then in debt to the amount of \$80,000 or \$90,000. These debts were secured by deeds of trust on his property. The payment of some of the debts had been extended from time to time. Mr. Baker had but little, if any, property, other than that here in question which was not thus incumbered. Taxes on the property were not all paid. There can be no doubt but he was then in embarrassed circumstances and nothing but the best of management and good credit would save him from ruin. Judgments and foreclosure sales followed in rapid succession. We disregard the statement testified to by the witness, Simmons, and still can come to no other conclusion than this, that he was at the date of the deed to the daughter in straightened circumstances. If a debtor is in embarrassed circumstances and makes a voluntary conveyance, and is afterwards unable to meet his debts owing at the time the conveyance was made, in the ordinary course prescribed by law, such conveyance is void as to those debts. *Potter v. McDowell*, 31 Mo. 62; *Patton v. Casey*, 57 Mo. 118; *Payne v. Stanton*, 59 Mo. 158.

1. But the further question then is; was this deed voluntary, or was it upon a valuable consideration? The property thereby conveyed, though subject to the life estate of Mrs. Jemima Lindell, was of a value of not less than \$7,000 and not greater than \$15,000; the latter estimate is nearer the real value. The deed was made for the alleged consideration of one hundred dollars. Mr. Baker had for some time thought of giving this property to his daughter. In July, 1878, his wife and

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daughter were at Oconomowoc, Wisconsin, for the summer. The deed was sent to the wife for her signature, and by her signed and returned to St. Louis. It was then signed by Mr. Baker and recorded, when he took it to his daughter and was paid by her therefor, he states, one hundred dollars in a few minutes after his arrival. The daughter was but twenty years of age, was then living in affluence, and as might well be expected knew but little of the property or of its value. There had been some previous talk about selling the property to her for that amount, but the evidence in that behalf is not definite. Mr. Baker says the daughter paid him the one hundred dollars in one bill, and she says she paid it in bills and silver. They agree that the money was given to her by her mother. It appears Mr. Baker had years previous agreed with his wife to allow her \$2,000 annually to do with as she pleased, but at the date of this deed he owed her \$8,000 on that account. He had sent his wife money while in Wisconsin to defray her expenses there, and the conclusion is irresistible that the one hundred dollars was given by the mother to the daughter out of that, and then by the daughter to the father, so that he really paid himself out of his own money. Besides this the alleged consideration of one hundred dollars is wholly disproportionate to the value of the property, and if in fact paid at all, was thus paid to give color to the transaction, and is not a valuable consideration. *Kuykendall v. McDonald*, 15 Mo. 416; *Fisher v. Lewis*, 69 Mo. 632; Bump on Fraud. Con. [3 Ed.] 209. The deed must be held to be a voluntary conveyance without a valuable consideration.

2. The further contention is that this deed was made valid by matters *ex post facto*. The defendant James F. Antisdell and the daughter of John Baker to whom the deed was made, were married in February, 1881, and had been engaged for six months prior thereto, during which time Mr. Antisdell had the deed in his pos-

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session. He did not have any actual knowledge of this suit until two or three days before the marriage, though process had been served on the other defendants previous to that, and a statutory *lis pendens* was filed in December, 1880. Marriage is doubtless a valuable as distinguished from a good consideration. A purchaser from a fraudulent grantee for a valuable consideration without notice takes a good title. In 2 Sug. on Ven. (Am. notes by Perkins) 469, it is said: "So if a person is induced to marry a voluntary grantee on account of such provision, the deed, though void in its creation as to purchasers, will no longer remain voluntary; but it becomes unimpeachable only from the date of the matter *ex post facto*, and it must be presumed that the parties did act upon the provision." Again, "Wherever there is a voluntary conveyance which is not actually fraudulent in the hands of a grantee, if a subsequent marriage takes place, and the conveyance form any inducement to the marriage, that is sufficient to render the conveyance valid, not only as against a subsequent purchaser, but also as against the creditors of the grantor." *Wood v. Jackson*, 8 Wend. 33. Other cases of a like import are cited by counsel for appellants.

Here the creditor procured his judgment, the property was sold and purchased by the plaintiff, and this suit was commenced before the marriage was consummated. If Mr. Antidel is to be regarded in the light of a subsequent purchaser for value, still he became such after the rights of the plaintiff had attached as well as pending the litigation and, therefore, subject to the result of the suit. The executory agreement—the engagement—does not place him in the attitude of a purchaser for value. For these reasons, if for no other, the marriage constitutes no defence to this action.

3. Where a debtor conveys his land in fraud of creditors, the creditor may institute his suit to set aside the fraudulent deed and subject the land to the payment

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of the debt by thus first ascertaining the interest of the debtor therein, or he may sell the land under execution before the ascertainment of the debtor's interest, and then set aside the fraudulent deed. The purchaser at the execution sale will occupy the same position as if he were the creditor. It is to be regretted that the former course is not more frequently pursued, and thereby avoid the sacrifice of property and speculation attending such execution sales, of which this case is no exception; but the right of the creditor to pursue either course is well established in this state. *Bobb v. Woodward*, 50 Mo. 95; *Ryland v. Callison*, 54 Mo. 513; *Zoll v. Soper*, 75 Mo. 460.

The judgment must be affirmed and it is so ordered. All concur.

HOWARD V. HECK *et al.*, Appellants.

1. **Revenue: ASSESSOR'S BOOK, VERIFICATION OF: JURISDICTION: TAX SALE.** The failure of the county clerk to sign and seal the assessor's book, as required by section 65, page 1171, 2 Wagner's Statutes, renders it of no official validity, and makes the collector's report of the delinquent list to the county court, as provided by section 190, page 1198, 2 Wagner's Statutes, unauthorized and invalid; and the county court, in such case, is without jurisdiction and powerless to act.
2. **Tax Sale, Impeachment of Validity of: EVIDENCE,** The validity of a sale of land for taxes may be contradicted by showing any substantial non-compliance with the revenue act, and all books, papers and records in the county clerk's office, pertaining to the subject of taxation, may be introduced in evidence for that purpose. Wag. Stat., sec. 211, p. 1204; *Ewart v. Davis*, 76 Mo. 129.

Appeal from Moniteau Circuit Court.—HON. E. L. EDWARDS, Judge.

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REVERSED.

Draffen & Williams for appellants.*Edmund Burke* for respondent.

(1) Failure to return the delinquent tax list shall in no way affect the validity of the assessment, judgment, sale or lien of the state. W. S., 1872, sec. 172, p. 1194. (2) The notice of sale was sufficient. W. S., 1872, sec. 184, p. 1197. (3) Plaintiff's deed was in the exact words of the statute and contained all that was essential. *Wilhite v. Wilhite*, 53 Mo. 74; *Stewart v. Seeverance*, 43 Mo. 322; *Williams v. McLanahan*, 67 Mo. 499. (4) The blending of the taxes of 1873 and 1875 in the deed was immaterial. *Wilhite v. Wilhite*, 53 Mo. 74; *Stewart v. Seeverance*, 43 Mo. 322. (5) The assessment and tax sale were made while the law of 1872 was in full force and by it plaintiff's rights should be determined. *State ex rel. v. Mantz*, 62 Mo. 260. (6) No assessment of property or charges for taxes therein shall be considered illegal on account of any informality in making the assessment, or in the tax list, or on account of the assessments not being made or completed within the time required by law. W. S., 1872, p. 1168, sec. 53; *State ex rel. Halpin v. Powers*, 68 Mo. 327. (7) Even though some informality or irregularity may have occurred in the proceedings of the county court in subjecting the lands in suit to sale, the same was cured by section 19, page 1036, Wagner's Statutes. The tax deed was properly made by the collector in office at the time of its execution. W. S., 1872, p. 1205, sec. 216; W. S., 1872, p. 1205, sec. 216.

SHERWOOD, J.—Plaintiff brought suit in ejectment for three hundred and seventy acres of land sold for the sum of \$101.83 for taxes, assessed for the years 1873 and

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1875. Each tract of the land was knocked off to him for the precise amount of the tax assessed thereon and no more.

Section 65 of the revenue act then in force (2 W. S., p. 1171) required that the county clerk, within ninety days after the assessor's book is corrected and adjusted, make a fair copy thereof, with the taxes extended therein, authenticated by the seal of the court, for the use of the collector. The copy of the assessor's book for the year 1873 was not signed, sealed, nor in any manner authenticated by the county clerk, as required by the section already mentioned. The same lack of a certificate is shown by the tax book for 1875. It follows from these premises that the so-called tax books, not being authenticated in any manner whatever, cannot be regarded in any other light than mere unofficial lists bearing on their face none of the insignia of authority. Treating of this subject an author says: "The tax list is the warrant of the sheriff to collect the taxes, and it should be authenticated by the official certificate of the clerk as a true copy of the original list filed and recorded in his office. The list ought to be so authenticated as not only to satisfy the sheriff that it is a copy of the original, but also to appear upon inspection to the citizens to be official evidence of their liability. It would seem of necessity that a mere copy of the list, not purporting to state what it is, nor whence it comes, nor by whom made, would not answer the purposes intended by the legislature." *Blackwell on Tax Titles* [4 Ed.] 193. Another author, discussing the same matter, observes: "Before a collector is authorized to proceed in the collection of the taxes, he must have his warrant for the purpose, in due form of law. * * * No question is made any where of the correctness of this doctrine. Whatever may be the requisites of the warrant under the statute, care must be taken that they be observed." *Cooley on Taxation* [1 Ed.] 292.

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Blackwell elsewhere remarks: "The rule is well settled that every public document, which is required by law to be executed by a public officer, and preserved as a memorial of the facts recited in it, must be verified by the official signature of the person who made it. The object of the rule is the identification of the document as an official act executed by authority of law; and its spirit is answered only when the official character of the person making it is established, and the document appears upon its face to be an official act attested by the signature of the officer. The reason of the rule is obvious." p. 379. * * * "The principle is uniformly conformed to by all the great departments of government. The proclamations of the King bear upon their face the official character of the act. The process of the courts runs in his official name, are attested by his chief judicial officer and authenticated with the seal of the court. The presiding officers of the two houses of parliament authenticate the passage of all bills, and the legality of warrants, by their official signatures. And in this country every officer, from the President down to an overseer of the poor, verifies in this manner his official acts. The rule extends to all official documents connected with the sales of land for the non-payment of taxes."

"The statute of Vermont required the collector to advertise the delinquent list before selling the lands of non-residents, to deposit with the town clerk the newspaper containing the advertisements, and the clerk was directed to record them at length in a book to be kept for that purpose. In *Spear v. Ditty*, 9 Vermont, 282, the defendant relied upon a tax title and offered in evidence the record of the town clerk, headed 'collector's advertisements.' The record showed that the advertisements were simply signed, 'E. Spaulding,' without the addition of the word, 'collector.' In the form of the ad-

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vertisement prescribed by law, the official title was added. The court held the sale void for the omission in the record of the town clerk. The court remarked: 'It is not true that every man is presumed to be clothed with and to be exercising an official capacity, because it seems to be needed for what he was attempting. Such a principle would sweep away all official signatures and designations. The statute form must be strictly followed. Even a known public officer must so sign every official document. It is difficult to see how any one can act officially on paper and not so state on the paper.''' Blackwell on Tax Titles [4 Ed.] 380, 381.

This court has enunciated similar views in *Town of Warrensburg v. Miller*, 77 Mo. 56; *Ewart v. Davis*, 76 Mo. 195, and *State ex rel. v. Cook*, 82 Mo. 185. If these views are to be taken as correct, then the collector, had he attempted to seize and sell the property under and by virtue of the unauthenticated tax list, would have been a mere trespasser, and this for the reason that in contemplation of law he had no warrant or authority for his acts. And no other conclusion can be drawn as to the invalidity of his act when he reported the delinquent list to the county court, under the provisions of section 190 of the revenue act. If he would have had no authority to act in the former case, then certainly none in the latter; and, therefore, it must follow that his return of the delinquent list was as unauthorized and invalid as would have been a sale by the collector of personal property. Taking this as true, a necessary corollary therefrom is that the county court acquired no jurisdiction in the premises to render a judgment against, or to order a sale of, the land in question. When discussing the provisions of the revenue act, in *Lagroue v. Rains*, 48 Mo. 536, and of the degree of strictness in proceedings under its provisions, this court said: "Power is conferred upon the [county] court, to be exercised on certain de-

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fined and limited contingencies; and these contingencies must have happened, and the conditions on which it can act must have been performed, before its act can be valid. Its authority does not attach until the law has been pursued and complied with."

The contingencies in this case on which depended the power of the county court to act, not having happened, by reason of the fact that the collector had not been provided with a "tax book" such as the law would recognize, the county court must be held without jurisdiction in the premises and powerless to act. And it has been ruled that the tax book delivered to the collector is an essential link in the chain of procedure which ends in a perfect tax title: is as much jurisdictional as is the assessment list. *McCready v. Sexton*, 29 Iowa, 356; and this latter, unless verified as required by law, was altogether invalid, and all subsequent proceedings based thereon equally worthless. *State ex rel. v. Cook, supra*.

As to the binding force and effect of the judgment of the county court, it is only necessary to refer to our discussion of that subject in *Ewart v. Davis, supra*, and of the provisions of section 211 of the revenue act, allowing in contradiction of the validity of the sale of land for taxes the introduction in evidence of all the books, papers, and records in the county clerk's office pertaining to the subject of taxation.

There are other errors assigned, but the one mentioned is regarded fatal to plaintiff's case, and, therefore, judgment reversed. All concur, except Henry, C. J., who dissents.

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DALE *et al.* v. DALE *et al.*, *Appellants.*

Partition : COSTS. The proceeds of the sale of one tract of land, sold for the purpose of partition, cannot be applied in payment of fees or costs in proceedings for partition of another tract of land.

Appeal from Clay Circuit Court.—HON. G. W. DUNN,
Judge.

REVERSED.

D. C. Allen for appellants.

SHERWOOD, J.—The proceeds of the sale of one tract of land, sold for the purpose of partition, cannot be applied in payment of fees or costs in proceedings for partition of another tract of land.

This is the summary of the law and facts of the case, and judgment reversed.

BENT, *Receiver*, v. LEWIS, *Administrator*, *Appellant.*

1. **Fraud : EVIDENCE.** A plaintiff will not be permitted to recover in an action based on the alleged fraud and corrupt agreement of defendant's intestate on evidence circumstantial in kind and of a vague and indefinite character, when by his own admission he has it in his power to produce positive and direct proof of the facts he alleges.
2. ———: ———. The action of the trial court in this case in permitting plaintiff to withhold such direct and positive evidence, and the name of the person by whom it could be established, held to be erroneous and ground for reversal.

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Appeal from St. Louis Court of Appeals.

REVERSED.

Noble & Orrick for appellant.

(1) The application of defendant for a change of venue was made under a condition of the cause, and contained such statements of facts as entitled the applicant to an order in accordance with his prayer, as a matter of right. *Corpenny v. City of Sedalia*, 57 Mo. 88-92; *Barnes v. McMullins*, 78 Mo. 265-266; *Mix v. Kepner*, 81 Mo. 93-96; *Ex parte B. M. Chambers*, 10 Mo. App. 240. The statute provides that changes of venue shall be awarded to and from the courts of said city (St. Louis) as if were a county. R. S., secs. 3742, 3733. The application was in strict accordance with the statute; was made upon due notice; there was no contest over it. It was refused without right, and this was error. *Darby v. Stark*, 60 Mo. 51, and cases above cited. (2) The several motions to compel plaintiff to state a fair and distinct cause of action instead of the indefinite and uncertain statement contained in the petition were illegally refused. (3) Any action sustainable on any theory was in favor of Alexander, receiver of the Mound City Life Insurance Company (afterwards called the Columbia), and not of Bent, receiver. This vice inheres in the amended petition as the outgrowth of the original petition. (4) That this action has been prosecuted on a champertous contract between the receiver, Bent, and the attorney, Glover, and on a speculation by both attorneys, Glover and Gantt; and should be dismissed. *Duke v. Harper*, 66 Mo. 51-60; *Million v. Ohnsorg*, 10 Mo. App. 434; *Swanston v. Mining Co.*, Fed. Rep. (1882) 215; *Barker v. Barker*, 14 Wis. 142; *Webb v. Armstrong*, 5 Humph. 379; *Morrison v. Deaderick*, 10 Humph. 342; *Greenman v. Cohie*, 61

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Ind. 201; *Herman v. Brewster*, 7 Bush, 355; *Allard v. Lamirande*, 29 Wis. 592; *Barnes v. Strong*, 1 Jones (N. Car.) Eq. 100; *Hunt v. Lyle et al.*, 8 Yerg. 142; 4 Black. Com. 135; *King v. Worden*, 12 Modern, 340. The contract is just as illegal made pending the suit as at any other time. *Barnes v. Strong*, *supra*. Rescission after action commenced does not prevent the legal bar. *Herman v. Brewster*, 7 Bush (Ky.) 355. (5) The statute of limitations pleaded in the answer and confessed in the reply is a complete bar to this action, and should have been so held. The action is not for relief "on the ground of fraud" within the meaning of the statute. *Carr v. Thompson*, 87 N. Y. 160; *Thompson v. French*, 40 Iowa, 603; *Ashhurst's Appeal*, 60 Pa. 290; *Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 230; *Wells v. Perry*, 62 Mo. 573; Where money is received in a fiduciary capacity the statute begins to run immediately. *Johnson v. Smith's Adm'r*, 27 Mo. 591; *Ricord's Adm'r v. Watkins*, 56 Mo. 555; *Berry v. Pierson*, 1 Gill. (Md.) 234-248; *Robinson v. Hook*, 4 Mason, 152. See also: *McLane's Adm'r v. Shepherd's Exec.*, 21 New Jersey Eq. 76-80; *Robinson v. Hook*, 4 Mason, 152; *Zacharias v. Zacharias*, 33 Pa. St. 455-456; *Beaubien v. Beaubien*, 23 Howard, 208. The statute makes the lapse of five years an absolute bar to all actions for implied liabilities or obligations. G. S., 747, sec. 10, R. S., 1879. The reply to the plea of the statute, while it confesses the plea, does not avoid it. Discovery being in avoidance must be affirmatively averred and proven in particulars of time, manner and substance. *Wood v. Carpenter*, 101 U. S. 140; *Godden v. Kimmel*, 99 U. S. 211-212; *Sleearns v. Page*, 7 Howard, 828; *Moore v. Green*, 19 Howard, 72; *Beaubien v. Beaubien*, 23 Howard, 208; *Badger v. Badger*, 2 Wall. 95; *Marsh v. Whitmore*, 21 Wall. 185. "Whenever the plaintiff relies on some special matter in his replication to the plea of the statute, he must plead it. * * *

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The defendant must have information as to the facts proposed to be set up as a suspension of the statute, and the court erred in admitting the evidence." *Moore v. M. & S. Co.*, 80 Mo. 91. The reply in this case does not assert when the discovery occurred, what the facts were, or any of the circumstances. (6) There is no averment that discovery was made at any particular time or date. There is no proof of any discovery by plaintiff before or at time of commencing the action. He expressly states he made no discovery until two months at least after action was brought by Mr. Glover. (7) There was no concealment by defendant, William J. Lewis, and section 3244, Revised Statutes, 1879, does not apply. The section relates wholly to acts performed after the liability accrues. *Arnold v. State*, 2 Mo. 14; *Smith v. Newby*, 15 Mo. 159; *Wells v. Halpin*, 59 Mo. 92. *Bent v. Priest*, 10 Mo. App. 562, does not apply. There is no testimony, such as there referred to in this cause. Here was a contest as to the validity of the reply on entirely different grounds, and a hearing at which no evidence of the least weight was embodied in support of the reply. (8) The court below should have suppressed the depositions of Wilbur F. Boyle. The certificates showed he was not sworn in the present cause, but was sworn in a case styled Silas Bent, plaintiff, v. William J. Lewis, defendant. (9) The testimony of Lomax, set forth in defendant's statement, and objected to, should have been excluded as mere hearsay. 1 Green. on Evid. secs. 110, 111, 113. (10) The testimony of Charles H. Peck as to statement of an unknown and unnamed person, as to agreement of William J. Lewis, should have been excluded when offered. 1 Green. on Evid. secs. 113, 125; *Langsdorf v. Field*, 36 Mo. 445 a; *Howell, Excr., v. Howell*, 37 Mo. 124. Having been admitted on professional statement of plaintiff's attorney as to expectation of making competent,

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it should have been subsequently ruled out. *Daniels v. Porter*, 1 M. & M. 501. The declaration of an unnamed person cannot be used to implicate a party and then be allowed as competent testimony because the party is thus implicated. *Wiggins v. Leonard*, 9 Iowa, 197. The person known to plaintiff should have been called. 36 Mo. 445; 37 Mo. 124. (11) The release pleaded by defendant, as given to Charles H. Peck by the receivers of the St. Louis Mutual Life Insurance Company, was a complete bar to this action, and as it was proven and admitted in evidence, the court should have decreed for the defendant. A contract will be interpreted in the sense in which the maker knew or had reason to suppose it was understood by the promisee. *Hoffman v. Ins. Co.*, 32 N. Y. 413; *Barlow v. Scott*, 24 N. Y. 40. (12) The suit is for the same assets settled for by the agreement of May 2, 1878, and to which plaintiff had no legal claim whatever, but the title to which vested in Alexander, receiver of the Columbia. (13) There is a total failure of proof to support the averments of the petition in form or substance. [The judgment is expressly for a debt. The rule that the plaintiff must recover, if at all, *secundum allegata et probata*, applies in equity, as at law. 2 Daniel's Chancery Practice, 1034, 996-7; *Ensworth v. Barton*, 60 Mo. 511, 514; *Clements v. Yeates*, 69 Mo. 625, and authorities there cited; *Baily v. Ryder*, 10 N. Y. 363. It is the same under the code as before. *Holden v. Vaughn*, 64 Mo. 590; *Conway v. Reed*, 66 Mo. 351, 352.

Thomas T. Gantt and *John M. Glover* for respondent.

(1) In actions charging one with fraud, evidence of character is admissible only where he is charged with fraud from mere circumstances. Greenl. on Evid. sec. 54 and note. In this case three concurring and unimpeachable witnesses depose to facts wholly inconsistent with the hypothesis of the innocence of Mr. Lewis. (2) Where a

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contract is champertous it is void, and no court will enforce it, but until there be a question of such enforcement, no court will interfere. Besides there is no evidence in the record to support the charge of champerty.

(3) "If a trustee accepts any benefits in conducting the business of his *cestui que trust*, he will hold them in trust for him," and "the directors of a corporation are trustees and agents of the corporation." Perry on Trusts, secs. 206-7; Lewin on Trusts, 318; *Gaskell v. Chambers*, 26

Beav. 360. (4) There was no variance between the case made by the pleadings and that shown by the proofs.

Allegations of unessential matter—matter without which the charge of the bill is complete—need not be proved.

Williamson v. Allison, 2 East, 452. (5) A trustee on money in his hands, not reported according to law, and used by him, should be charged with ten per cent. interest computed with annual rests. *Williams v. Petticrew*, 62 Mo. 460.

(6) The statute of limitations in actions for relief on the ground of fraud, does not begin to run until the discovery of the fraud. R. S., secs. 3228 and 3230; *Hunter v. Hunter*, 50 Mo. 445; *Thomas v. Mathews*, 51 Mo. 107.

HENRY, C. J.—On all questions presented for consideration by this record, the court concurs in the opinion delivered by the court of appeals, from whose judgment this appeal is taken, except one, which we will hereafter consider. I may also remark that as to the main question, viz., the right of the receiver to recover from the estate of W. J. Lewis, money alleged to have been received by him as a bribe given for the betrayal of his trust, as one of the directors of the St. Louis Mutual, this court adheres to its decision in the case of *Bent, Receiver, v. Priest*, 86 Mo. 475.

The allegation in the petition is, that William J. Lewis received thirty thousand dollars of the assets, and

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proceeds of assets, belonging to the St. Louis Mutual Life Insurance Company, in consideration of his having corruptly, as one of the directors of said company, promoted the making of a contract between that company and the Mound City Life Insurance Company, by which the latter agreed to reinsure all the risks of the former, in consideration of a transfer by the former to the latter of all the assets of the St. Louis Mutual Life Insurance Company. This was a material and vital allegation. No cause of action is alleged, if it is eliminated from the petition. It devolved upon plaintiff to prove it. On this issue the testimony of Charles H. Peck, who was selected by the Mound City as a proper agent to corrupt the directors of the St. Louis Mutual, was, in substance, as follows: That there was an understanding between *him and a person claiming to represent Mr. Lewis*, that Lewis was to have a part of a fund of one hundred and fifty thousand dollars received by Peck from the Mound City Life Insurance Company. To this defendant's counsel objected, saying, "I wish to know what was said and done and *who did it*, and *when* and *where*, and I move to exclude the answer of the witness." The court overruled the motion. Mr. Peck was asked by plaintiff's counsel: "What was said, if anything, as to why he [Lewis] was to have the money, or what for, as a part of the agreement." His answer was: "I don't know that I can recollect the precise words." He was then asked to state the substance. His answer was: "Mr. Lewis' name was mentioned as one of the parties to receive a portion of this fund, in the event of a reinsurance of the company. This was before the reinsurance was effected." Throughout the examination of this witness, defendant endeavored to get him to disclose the name of the person who assumed to act for Mr. Lewis, but it was studiously withheld. The court was asked to state whether it would admit the testimony of Peck as to

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the unknown party, and, in relation to that request, Mr. Glover, of counsel for plaintiff, said, "If the court please, that motion arises out of a desire to save the connection of a certain party, not a party in suit, but a party in interest in this matter. If there is any peril involved in failing to make proof which we were to offer, we will assume it." Mr. Peck testified that he handed Lewis a check on the bank of which Lewis was president, for twenty thousand dollars, and that not a word passed between them on that occasion. He does not state that he ever had a conversation with Lewis with regard to any money he was to receive of that corruption fund. Does not state what Lewis did, or agreed to do as a consideration for the twenty thousand dollars received by him. The name of the third person, who, he says, assumed to act for Lewis, was not disclosed.

There is not a particle of direct testimony connecting Lewis with that party. The fact, testified to by Peck, that he, Peck, delivered to Lewis a check for twenty thousand dollars, is a specimen of the connecting testimony. What that unknown party, that man in a mask, may have said to Lewis, what the consideration was which Mr. Lewis agreed with the unknown and unnamed to give for the twenty thousand dollars, is not disclosed. It is a mere matter of conjecture. He may have agreed to pay Mr. Lewis the twenty thousand dollars upon a very different account than that alleged in the petition. It may have been a legitimate contract. He may have disobeyed Peck's instructions. The defendant had a right to know who that person was, and where he lived. And the court erred in permitting plaintiff to prove what a person did and said as the agent of Mr. Lewis, without disclosing his name, or residence, or proving his agency, except by circumstantial evidence of the most unsatisfactory character, when it is fairly inferable, from what occurred at the trial, that he was within the reach of the

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process of the court, and could have been called as a witness by plaintiff or by defendant, if plaintiff had seen proper to give his name. It was virtually the admission of testimony of what that unnamed person who assumed to act for Mr. Lewis said and did, and was hearsay evidence. When this cause was tried, Mr. Lewis was dead, having left a large estate and a reputation for integrity of infinitely more value to his family than all his property. His administrator was contesting the case under most unfavorable circumstances, knowing nothing of the transaction which gave rise to the litigation, and if this unknown party had been introduced as a witness by plaintiff, or his name and residence had been disclosed so that he might have been called by the defendant, the administrator would have had an opportunity to go to the bottom of the transaction and get the precise facts before the court. The refusal of plaintiff to call him as a witness, and to give his name and residence, is akin to the suppression of testimony, and gives rise to conjectures, not at all favorable to Peck's testimony or plaintiff's cause. "The circumstance that a particular person who is equally within the control of both parties, is not called as a witness * * * lays no ground for any presumption against either." *Scovill v. Baldwin*, 27 Conn. 318.

But here is a person who is the only one living who can testify to what passed between him and Lewis. The plaintiff, who seeks to recover upon facts peculiarly within the knowledge of this person, and who knew his name and residence, of both of which the defendant administrator is ignorant, would neither offer him as a witness nor disclose to the defendant his name or residence, or permit a witness testifying in his behalf to do so. If the plaintiff wished to screen this party from exposure, he should not have introduced testimony connecting him with the transaction; but, having introduced such testimony, it affords a presumption that, if he had been in-

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roduced as a witness by the plaintiff, or if his name had been disclosed to defendant, and he had offered him, his testimony would have been favorable to the defence. In the case of *Eck v. Hatcher*, 58 Mo. 235, this court laid great stress upon the fact that Hatcher, charged with fraud in the purchase of a tract of land, did not go upon the witness stand and testify in the case. So in *Mabary v. McClurg*, 74 Mo. 575. The facts in those cases, and the facts in the case at bar, it is true, are not analogous, but the principle involved is the same. The plaintiff here could not testify to what transpired between Lewis and the unknown party, but he knew that party, and also his relations to Mr. Lewis in this matter, and that he was within the reach of the process of the court. If Lewis had been alive, it would be different; but here was his administrator, struggling under disadvantages, not only to save the estate, but the reputation of the intestate; and the very man who could have told precisely what occurred between him and the intestate, was not only not offered as a witness, but his name and residence were studiously and persistently withheld from defendant.

That there was other testimony upon which the court might have found against the defendant may be conceded, but that it would have so found, excluding the incompetent testimony which was admitted, is by no means certain. Mr. Lomax was permitted, over defendant's objection, to testify to declarations made by Peck, after the reinsurance was effected, that Lewis was to receive a part of the funds transferred to Peck by the Mound City Life—declarations not made in the hearing of Lewis—or communicated to him, and not competent against Lewis. The strongest testimony in the case against Lewis is that of Judge Boyle, who testified: That he had a conversation with Lewis in which Lewis stated to witness that he had a transaction with Peck, in connection with the reinsurance, and that he had received

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twenty thousand dollars from Peck, and had contributed \$6,666.60 toward the payment of an amount Peck agreed to pay on a compromise of a suit against him to recover the assets he had received from the Mound City. That Lewis was informed that Peck was to receive one hundred thousand dollars from the Mound City for services in obtaining the consent of the *stockholders* of the St. Louis Mutual to the contract of reinsurance, and for his aid in getting an additional subscription of five hundred thousand dollars to the capital stock of the Mound City, which was required before the contract of reinsurance could be carried out, and, in the event that Peck received that amount, he intended to give Mr. Lewis twenty-five thousand dollars of it. Lewis made no reply, except that if the Mound City's stock was increased to a million dollars, the reinsurance would be a complete security to the policy holders of the St. Louis Mutual, and if the stockholders saw fit to pay Peck for his services, he saw no objection to it. There is not a word in all this testimony of the corrupt agreement alleged. Judge Boyle says that Peck was to receive the one hundred thousand dollars for procuring the assent of the *stockholders*, not the *directors* of the St. Louis Mutual, and for additional services in increasing the capital stock of the Mound City; and if he received that amount, he intended to give Mr. Lewis twenty-five thousand dollars of it. On what account? For his vote as a director? or any other service, as a director, he might render, in promoting the contract? Judge Boyle does not so testify—nor does any other witness, and it is exceedingly strange if Mr. Lewis had made such a corrupt agreement with Peck, that he should have unblushingly mentioned his connection with Peck, and receipt of the money from him to Judge Boyle or any one else. There is a great deal of mystery in the case that might be cleared up, if the person who assumed to act for Lewis were called to testify.

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Excluding the incompetent testimony admitted, and that of Mr. Peck in relation to this unknown, unnamed, masked man, who is a prominent figure in the case, but whose features, name, residence and occupation are concealed, and the corrupt contract alleged was not proved. That there is sufficient testimony to excite a suspicion that there was something wrong in the receipt of the money by Mr. Lewis, is not sufficient. The allegation that he received it, in breach of the confidence reposed in him by the company, must be established by the testimony. "Facts which give rise to suspicion only, do not establish actual fraud which must be proved, and not conjectured." *Priest v. Way et al.*, 87 Mo. 16. We do not mean to say that it may not be proved by circumstantial evidence, but whatever the character of the testimony may be, it should fully sustain the charge. He did not receive anything which then belonged to the St. Louis Mutual. It is alleged that he did, but the evidence is to the contrary, and it is conceded by plaintiff's counsel that "the evidence wholly failed to show that the securities, before coming into the hands of Peck, belonged to the St. Louis Mutual Life Insurance Company. They had, indeed, once belonged to that company, but were transferred and assigned, with all the rest of the assets, by the contract, dated December 13, 1873, to the Mound City Life." The variance in this respect between the allegation and the proof may be immaterial; but the other specific acts and agreements alleged against Lewis, had no direct evidence to support them, and excluding incompetent testimony received, it is not clear that plaintiff was entitled to recover.

The legitimate testimony in the cause, it may be conceded, establishes the following facts, nothing more: That Lewis received of Peck twenty thousand dollars; that it had been said in his presence that Peck was to receive from the Mound City one hundred thousand dol-

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lars in consideration of his services in procuring the consent of the stockholders in the St. Louis Mutual, to the agreement between that company and the Mound City, and increasing the capital of the latter to one million dollars, and that if he received that amount, one hundred thousand dollars, he intended to give Mr. Lewis twenty-five thousand of it; that Lewis said if the capital stock of the Mound City was increased to a million dollars, the reinsurance would be complete security to the policy holders in the St. Louis Mutual, and if the *stockholders* saw fit to pay Mr. Peck for his services he saw no objection to it; that afterwards Peck handed him a check on the bank of which Lewis was president for twenty thousand dollars; that Lewis afterwards told Boyle that he had a transaction with Peck in connection with the reinsurance and had received of Peck twenty thousand dollars, and paid \$6,666.66 2-3 toward the payment of an amount which Peck had agreed to pay on a compromise of a suit instituted by the receivers of the St. Louis Mutual against him to recover the securities delivered to him by the Mound City Life. That the above facts furnish ground for a suspicion that there was something wrong in the transaction is not to be denied, but do they prove the cause of action alleged, viz: That in consideration that Lewis would promote the making of the contract between the St. Louis Mutual and the Mound City, Peck agreed to, and did pay him twenty thousand dollars? Is not the conclusion from the above facts, that such was the agreement, mere conjecture? and shall a plaintiff recover on testimony of the most vague and indefinite character, when, by his own admission, he has it in his power to produce testimony, positive and direct, that the corrupt agreement he charges was made, if made? When a party seeks to recover against another upon a charge of fraud, he has no right to leave the court to grope through a chain of

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circumstantial evidence, when he admits that he has direct positive testimony to the facts. It is fair treatment, neither to the court nor his adversary, and no court should in tenderness to a person connected with such alleged fraud, as the medium of communication between its perpetrators, permit him to be paraded in mask before the jury, his statements and acts disclosed by others and his name, residence and occupation withheld from both the adverse party and the court.

The judgment is reversed and the cause remanded.

SMITH, *Plaintiff in Error*, v. WASHINGTON.

1. **Equity : LACHES : LAND AND LAND TITLES.** The plaintiff in this case held to be precluded from successfully invoking equitable interference in behalf of his claim to land, because of the laches of his grantor and the latter's failure to perform his portion of the contract, which was the consideration by which he obtained his title.
2. **Land and Land Titles : QUIT CLAIM DEED : AFTER ACQUIRED TITLE.** The plaintiff's grantor, claiming title through a quit-claim deed from defendant, held not to be entitled in this case to any title afterwards acquired by the latter.

Error to St. Louis Court of Appeals.

AFFIRMED.

Henry H. Denison for plaintiff in error.

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Glover & Shepley, J. B. Henderson and J. S. Dobyms
for defendant in error.

SHERWOOD, J.—The defendant and others claimed to have inherited certain lands from H., their deceased father. These lands were held adversely. Defendant agrees with attorney, D., that if he will sue for these lands, he shall receive as compensation one-half of what is recovered, delivering to him at the same time, a quit-claim deed for one-half of her interest in these lands. D. does not record his deed nor sue for these lands, though it seems he does render some sort of service in the matter, the nature of which does not appear. But W. and her co-heirs do institute suit and prosecute the same with such success that in four years time the heirs of L., who are in possession of the lands, are willing to compromise. Whereupon a compromise is effected, whereby the heirs of H., including W., quit-claim certain blocks in the subdivision of the property, and leave them in quiet possession of those, while the heirs of L. likewise quit-claim other blocks to the heirs of H., including W., and put them in quiet possession. These deeds are duly put to record, imparting notice to all, and the process of interchange of deeds goes on for a year or two. D., meanwhile, does nothing, and seven years and a half after the agreement with W., already recited, and three years and a half after the recording of the first deed of the heirs of L. to W., he, for a consideration of one hundred dollars, quit-claims to the plaintiff any interest he may have obtained by reason of the quit-claim deed of W. The deed thus obtained as well as the one from W. to D., are at once put to record, and this suit is brought by plaintiff, and he claims that in consequence of the foregoing facts that he is entitled to one-half of any interest W. may have in the specific lots

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conveyed to her, and the other heirs of H. by the heirs of L., which lots, with other portions of the tract, W., at the time of her quit-claim deed to D., claimed, together with the other heirs of her father. The circuit court, on a general demurrer, held the above statements of the petition insufficient, and this ruling was affirmed by the St. Louis court of appeals. Nothing can be clearer than the correctness of this ruling.

I. The laches of Darby and his failure to perform his portion of the contract are sufficient in and of themselves to preclude him from successfully invoking equitable interposition in behalf of his stale and forfeited claim.

II. The deed of the defendant to Darby being a mere quit-claim, he was certainly not entitled to any after-acquired title obtained by defendant. There may be circumstances when tenants in common in possession under an imperfect title derived from a common ancestor, may be precluded from acquiring any additional interest in the land thus held, except on condition of sharing it with each other; but, manifestly, that is not this case.

III. If Darby had carried out his contract, and been successful in the suit brought, and while on the eve of success, defendant, in consequence of his exertions, had been enabled to make a compromise similar to the present one, and in so doing, she had ignored and trampled on his rights, a different case would have been presented.

IV. Inasmuch as any right Darby acquired in the premises, was lost by reason of his laches and his failure to perform his agreement, and as plaintiff stands in his shoes, the judgment should be affirmed. All concur.

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MASTIN, *Appellant*, v. GRIMES.

1. **Contract for Sale of Land: SPECIFIC PERFORMANCE: MEMORANDUM.** A memorandum of a contract for the sale and conveyance of land, although signed only by the party to be charged, when sufficiently clear and certain in its terms, affords a competent basis for a suit for specific performance.
2. ———: ———: ———. Where the memorandum stated that the residue of the purchase money "is to be paid as soon as abstract to said lots can be examined," the abstract to be furnished by the vendor, the law would imply that after the examination of the abstract, a reasonable time was to be allowed the vendee in which to make the payment.
3. ———: REASONABLE TIME. What is such reasonable time is dependent on the circumstances of the case and largely on the conduct of the contracting parties.
4. ———: TIME: WAIVER. Time is not generally deemed in equity to be of the essence of the contract for the sale and conveyance of land. And even if by express terms a day of payment be fixed and time is declared to be of the essence of the contract, still that is no bar to the time of payment being postponed or to its being waived altogether.
5. ———: ———: ———. If, after the expiration of the time limited for the performance of the contract, the parties continue to deal together or to treat the contract as still existing, this will amount to a waiver of the element of time.
6. ———: NOTICE TO COMPLETE CONTRACT. Where either the vendor or the vendee has improperly and unreasonably delayed in complying with the terms of an agreement for the sale and conveyance of land, the other party may by notice fix the time within which the contract may be completed, but such notice must allow a reasonable length of time for the other party to perform his part of the contract, and if it fail in this respect it may be disregarded.
7. ———: ———. A notice given by the vendor to the vendee to complete the contract within five days held insufficient under the circumstances in this case.
8. **Vendor and Vendee: WAIVER.** Where it is obvious from the statements of the vendor that he will not fulfill his part of the con-

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tract, all necessity of tendering the purchase money and demanding a deed are waived.

9. —: CLOUD ON TITLE. Where the delay on the part of the vendee is occasioned by facts which throw a cloud on the title to the land, and which render it suspicious in the minds of reasonable men, and to any considerable extent affect the value of the property, such delay cannot afford the vendor an opportunity to rescind the contract because of the failure of the purchaser to make payment of the purchase money.
10. **Specific Performance : ACTION BY VENDEE : DEFENCE.** In an action by a vendee for the specific performance of a contract for the sale and conveyance of land, the vendor set up as a defence that the plaintiff for the purpose of preventing a compliance with the terms of the contract on his part, had falsely and fraudulently pretended that defendant's title to the land was imperfect. *Held*, that the failure of the vendor to rescind the contract and to return or to offer to return the portion of the purchase money which he received was a bar to said defence.

Appeal from Jackson Circuit Court.—HON. F. M. BLACK, Judge.

REVERSED.

Karnes & Ess and C. O. Tichenor for appellant.

(1) By the contract sued on, plaintiff had an admitted right to the land; he did not by consent give up that right and if it is lost it must be by such conduct on his part as will make it inequitable if not fraudulent to assert it. (2) Time is not ordinarily of the essence of a contract. *Waterman on Spec. Per.*, sec. 469; *Pomeroy on Spec. Perf.*, sec. 371; *Smith v. Lawrence*, 15 Mich. 501; *McKay v. Carrington*, 1 McLean, 59; *Hubbell v. Von Schoening*, 49 N. Y. 330; *Jones v. Robbins*, 29 Me. 351; *Scarlet v. Stein*, 40 Md. 525; *Miller v. Miller*, 25 N. J. Eq. 368; *Pritchard v. Todd*, 38 Conn. 414; *Snowman v. Hartford*, 55 Me. 199; *Seton v. Slade*, 7 Vesey, 274; *Calcroft v. Roebuck*, 1 Ves. 224; *Woodward v. Van Hoy*, 45 Mo. 301. (3) Notice that the contract would be cancelled if the contract was not

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completed within five days was unreasonably short. *Hubbell v. Von Schoening*, 49 N. Y. 331; *Thompson v. Dulles*, 5 Rich. Eq. 370; Pomeroy on Spec. Perf., sec. 395; *Banks v. Burnham*, 61 Mo. 76. (4) The attachments on the land not only affected its market value, but exposed the owner to litigation, and this afforded a reasonable excuse for delay on plaintiff's part. *Hymers v. Branch*, 6 Mo. App. 315; *Socket v. Mason*, 31 Mo. 57; *Snyder v. Spaulding*, 57 Ill. 486; *Thompson v. Dallas*, 5 Rich. Eq. 370. (5) No deed was ever tendered plaintiff; none was ever executed. To have rescinded the contract he must have tendered a deed. *Bruner v. Wheaton*, 46 Mo. 367. (6) The part of the purchase money paid is still retained by defendant and he could not rescind without tendering it back. *Sanborn v. Batchelder*, 51 N. H. 434; *Guckenheimer v. Angrine*, 81 N. Y. 396. (7) Defendant by his conduct admitted the validity of the contract after the five days notice and thereby destroyed the effect of the latter. *Mix v. Balduc*, 78 Ill. 217; *Murrell v. Goodyear*, 62 Eng. Ch. 450. (8) The receipt given in this case is a sufficient memorandum. Reed on Stat. Fr., sec. 329; Pomeroy on Spec. Per., sec. 85 and note; Waterman on Spec. Per., sec. 235; *Fullon v. Robinson*, 55 Texas, 401; *Cossack v. Descoudres*, 1 McCord 425 (side page); *Welch v. Bayoud*, 21 N. J. Eq. 186; *Westervelt v. Mutheson*, 1 Hoff. Ch. 37; *Ellis v. Deadman's Heirs*, 4 Bibb. 466; *Barickman v. Kuykendall*, 4 Blackf. 21. (9) This receipt shows a mutuality of agreement, and it is sufficient when signed by the party sought to be charged. It is not optional or unilateral in its character, and if signed by both parties would be mutual as to remedy. Reed on Stat. Fr., secs. 361, 365; Pomeroy on Spec. Per., sec. 75 and note, also sec. 170; Waterman on Spec. Per., sec. 239 and note; *Glason v. Bailey*, 14 Johns. 489; *Ivory v. Murphy*, 36 Mo. 534; *Bean et al. v. Valle et al.*, 2 Mo. 126; *Luckett v. Williamson*, 37 Mo. 338.

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Bogges & Moore for respondent.

(1) Each action for the specific performance of a contract for the sale and conveyance of land must rest on its own peculiar facts. (2) Every such case is addressed to the sound judicial discretion of the chancellor to be granted or refused according to the very right of the case. (3) Time may by the terms of the agreement be made of the essence of the contract and to be strictly attended to, or it may be made so by subsequent notice. *Waterman on Spec. Perf.*, secs. 6, 465; *Pomeroy on Spec. Per.*, secs. 395-6-7; *Taylor v. Brown*, 2 Beav. 180; 5 Law Rep. 527; 10 Law Rep. 287; *Fuller v. Honey*, 2 Allen, 321; *Taylor v. Williams*, 45 Mo. 80; *O'Fallon v. Kennerly*, 45 Mo. 124; *Waterman on Spec. Perf.*, secs. 458-9-460; *Story on Equity*, 736-750. (4) Where the contract is unilateral—only one party signing and bound thereby—and remains entirely executory—the court will not decree specific performance at the suit of the party not bound where he is in default. *Jones v. Noble*, 3 Bush, 694; *Bispham's Equity*, sec. 377, note 11; *Fry on Spec. Per.*, sec. 721-733; *Kerr v. Purdy*, 51 N. Y. 629; *Marble Co. v. Ripley*, 10 Wall. 339-57; *Maughlin v. Perry*, 35 Md. 352; *Beach v. Dyer*, 93 Ill. 295-301; *Iglehart v. Gibson*, 56 Ill. 85; *M'Cah v. Rozier*, 69 Ill. 501-502; *Phelps v. Railroad*, 63 Ill. 463-469; *Magoffin v. Holt*, 1 Duvall [Ky.] 95; *Hoyt v. Tuxbury*, 70 Ill. 331-338; *Fessler's Appeal*, 75 Pa. St. 498. (5) It is believed that imperfection of title will not avail the vendee in such cases, as at most where he is not bound, whether he will trade or not is purely optional, and his option depends upon a strict compliance with the terms of the option. *Taylor v. Williams*, 45 Mo. 80; *Jones v. Noble*, 3 Bush, 694; *Kerr v. Purdy*, 51 N. Y. 629; *Maughlin v. Perry*, 35 Md. 352-7. (6) If in any case the vendee has a right to object to

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title, and delay performance on that account, his objections must be substantial and real, not captious or fanciful. *Hymers v. Branch*, 6 Mo. App. 511-14. (7) The vendor is not bound in all cases to restore the deposit paid, and surrender other things received by him by reason of the agreement to sell, as conditions precedent to rescission; at the most he is only bound to put himself in such attitude that he cannot himself enforce performance. *Staley v. Murphy*, 47 Ill. 241-4. (8) But this is not a case of rescission—there was no contract that respondent could have enforced—his only purpose or right was to terminate his own liability to perform; this he had a right to do by the notice read in evidence—placing his adversary clearly in default. Waterman Spec. Perf., sec. 465, *et seq.*; Pom. Spec. Perf., 395, and other authorities *supra*. If specific performance be not decreed, appellant is not without remedy if he is damaged. He still has his action at law for damages.

John K. Cravens also for respondent.

(1) A bill for specific performance of a contract for the conveyance of land will not be enforced unless there is mutuality of remedy on the contract when the bill is filed. *Mason v. Payne*, 47 Mo. 517; *Tull v. David*, 45 Mo. 414; 1 Chitty on Contracts, 11 and 16; 1 Sugden on V. & P. 196; 1 Parsons on Contracts, 449; *Moss v. Green*, 41 Mo. 389; *Lewis v. Ins. Co.*, 61 Mo. 534; *Mers v. Franklin*, 68 Mo. 129; *Jones v. Noble*, 3 Bush, 694; *Bodine v. Glading*, 21 Pa. St. 50; *Sturgis v. Galindo*, 59 Cal. 28; *Smith v. Reynolds*, 8 Fed. Rep. 696; *Richardson v. Hardwick*, 106 U. S. 252. (2) In all unilateral contracts, depending for consideration upon the performance of a stipulated condition, performance is a condition precedent, time is of the essence of the contract, and the promisee must perform within the period limited, or the contract does not bind. Waterman on Spec. Perf., sec. 434; *Magoffin v. Holt*, 1 Duvall, 95;

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Jones v. Noble, 3 Bush, 694; *Vassault v. Edwards*, 43 Cal. 458; 2 Leading Cases in Equity [4 Am. Ed.] 1129; *Mason v. Payne*, 47 Mo. 517-520. (3) In the class of contracts like the one under consideration, which for want of mutuality are designated "unilateral," the obligation of the party making the same is revocable at his will at any time before performance or offer to perform by the other. Waterman on Spec. Perf., sec. 134; Fry on Spec. Perf., sec. 178-180; *Perkins v. Hadsell*, 50 Ill. 216; *Vassault v. Edwards*, 43 Cal. 458; *Weaver v. Wood*, 9 Barr [Pa.] 221; *Railroad v. Bartlett*, 3 Cush. 234. (4) If one of two parties concerned in a contract respecting lands gives the other notice that he does not hold himself bound to perform and will not perform, the contract between them and the other contracting party to whom the notice is so given, makes no prompt assertion, within the time so fixed, of his right to enforce the contract, equity will consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the performance of the contract. 2 Leading Cases in Equity [4 Am. Ed.] 1056, 1061, 1135; *Routledge v. Grant*, 4 Bing. 653; *Kirby v. Harrison* 2 Ohio St. 326.

SHERWOOD, J.—Plaintiff seeks specific performance of an agreement in these words:

"KANSAS CITY, Mo., April 13, 1881.

"Received of D. C. Mastin ten dollars, being part purchase money for fifty feet by one hundred and thirty-two feet on the northwest corner Eighteenth and Cherry streets; also twenty-five feet by one hundred and thirty-two feet on the southwest corner Eighteenth and Cherry streets, Kansas City, Missouri, the balance being thirty-six hundred and ninety dollars (\$3690), to be paid as soon as abstract to said lots can be examined. Abstract to be furnished by William B. Grimes,

"WM. B. GRIMES,

"By L. F. RIEGER, Agent."

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The defence was "that the plaintiff on examination of said abstract falsely and fraudulently, and for the purpose of avoiding compliance with said memorandum, paying the balance of said purchase money and accepting a deed from defendant for said real estate, pretended the defendant's title to said real estate to be imperfect."

I. This agreement, though unilateral or "one-sided," because signed by only one of the parties thereto, is still such an one as will be specifically enforced in equity, the statute only requiring that the memorandum which takes the case out of its operation be signed "by the party to be charged therewith, or some other person by him thereto lawfully authorized." R. S., sec. 2513.

The ruling of courts of equity in this respect constitutes an exception to the principle which requires mutuality in agreements which are to form bases for specific performance. At one time the correctness of this view of the subject was denied. *Lawrenson v. Butler*, 1 Sch. & Lef. 13; *Armiger v. Clarke*, Bunb. 111. Chancellor Kent seems by his intimations in the cases of *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 232; *Benedict v. Lynch*, *Ib.* 370, to have favored the ruling made by Lord Redesdale in the case first cited, that both parties to the agreement must be bound or else neither would be; but in a later case, *Clason v. Bailey*, 14 Johns. 484, having occasion to review his former opinion, Chancellor Kent found it to be erroneous and admitted that the point was too well settled the other way to be questioned. To the like effect are: Fry on Spec. Perf., secs. 295-346, and cases cited; Waterman on Spec. Perf., sec. 201, and cases cited; *McCrea v. Purmort*, 16 Wend. 460; *Hunter's case*, 1 Edw. Ch. [N. Y.] 1; *Davis v. Shields*, 26 Wend. 341; *Green v. Richards*, 23 N. J. Eq. 32. There are some modern authorities to be found to the contrary of the position here announced; but the great current of authority flows in the direction

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above indicated. The memorandum being signed by the party to be charged, and being sufficiently clear and certain affords a competent basis for specific performance. There are in this case other questions yet remaining to be discussed.

II. It will be observed that the agreement in question does not specify when the payment of the residue of the purchase money is to occur. The words are: "To be paid as soon as abstract to said lots can be examined. Abstract to be furnished by Wm. B. Grimes." From this the law would imply that after the examination of the abstract a reasonable time was to be allowed the vendee to make payment. But what is a reasonable time is dependent on the circumstances of each case, and largely on the conduct of the contracting parties. Time is not generally deemed in equity to be of the essence of the contract. And even if by the express terms of the contract a day of payment be fixed and time declared to be of the essence of the contract, still this is no bar to the time of payment being postponed, or to this essential element being altogether waived. And if after the expiration of the time limited the parties continue to deal together or to treat the contract as still existing this amounts to a waiver. 1 Story on Eq. Jur., sec. 776; *Melton v. Smith*, 65 Mo. 315; *Mix v. Balduc*, 78 Ill. 217. Here, the deed to the defendant was executed on the fifth day of September, 1878, by John J. Mastin, then the owner of the premises in question, and between the time of the execution of the deed, and of its being put to record, which occurred on the thirteenth of the same month, several writs of attachment were levied on the property in question and on other tracts, some as early as the tenth of the month, as the property of John J. Mastin. The property described in the memorandum was taken by defendant for a claim against the Mastin Bank, which had then recently failed. Jno. J. Mastin and Thos. H. Mastin, brothers, owned the bank and defendant took the prop-

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erty in lieu of one thousand and five hundred dollars, which he had deposited in that bank. He also took from Jno. J. Mastin deeds for other tracts in the vicinity in payment of similar claims.

When the abstract came to be examined, which it seems was April 16, 1831, the fact of the levies of these various writs of attachments on the property, prior to the recording of the deed, became apparent and caused objections on account of them to be made by the counsel of plaintiff. The evidence satisfies me that thereupon an agreement was entered into between the parties to remove these attachment liens. This is established by direct evidence and by the acts of the parties. Certain it is that defendant and his agent immediately set to work very actively to remove the attachment liens, and from time to time reported progress to the plaintiff or his agent of the release of these liens. On September 5, 1881, before all the attachments were released the defendant gave the following notice :

“ KANSAS CITY, Mo., September 5, 1881.

“ *D. C. Mastin, Esq.*—

“ DEAR SIR : You are hereby notified that unless you consummate contract made with me, through my agent, L. F. Rieger, for the sale to you of fifty feet by one hundred and thirty-two feet, on northwest corner of Eighteenth and Cherry streets ; and twenty-five feet by one hundred and thirty-two feet on southwest corner Eighteenth and Cherry streets, Kansas City, Missouri, within five days from the date hereof by paying balance of purchase money, three thousand six hundred and ninety dollars, and accepting warranty deed from me therefor, pursuant to contract of April 13, 1881, made by said agent Rieger, I shall refuse to comply with said contract, but will declare same cancelled. I am ready and willing and hereby offer to make and deliver to you such a deed at any time within five days from the date

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hereof. At the end of that time said contract is hereby terminated.

“WILLIAM B. GRIMES.”

Counsel for defendant advised that ten days notice of the intended cancellation of the contract be given, but defendant insisted on giving the shorter notice and this was done. In the circumstances of this case, and considering the agreement made to have the attachment liens released, and considering that this was not entirely accomplished for about six weeks after the service of the notice, the time given to plaintiff thereby in which to comply with the agreement was altogether too short, regardless of the agreement to release the attachment liens. The shortest time to be found in the books ever given in such cases was one week, and it was given in a case somewhat similar to the one at bar, and it was held too short a period. *King v. Wilson*, 6 Beav. 124. In *Hubbell v. Von Schoening*, 49 N. Y. App. 331, the court say: “It was assumed by the learned judge on the trial, that one of the parties could, by notice to the other, make time of the essence of the contract, when, by its terms, it was not made so. This may be questionable, but need not be considered. The party in such case, if the operation and effect of the contract are to be essentially changed, so as to vary his rights or duties at the volition of the other, should have reasonable notice in advance of the time when he will be called upon to act.” In *Thompson v. Dulles*, 5 Rich. Eq. [S. C.] 370, the court say: “It is said where no time is fixed in the contract, or time is not essential, it will not, however, be permitted to the party who is to make the conveyance to trifle with the interests of the opposite party by unnecessary delay; it is in the power of the latter to fix some reasonable time, not capriciously or with intent to surprise, but a reasonable time according to the circumstances of the case, within which he will expect the title to be made at the peril of re-

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scinding the agreement." And a notice on December 23, that unless good title was tendered by January 1, the purchaser would consider the contract at an end was held unreasonable.

Pomeroy on Specific Performance, section 395, says: "If either the vendor or the vendee has improperly and unreasonably delayed in complying with the terms of the agreement, on his side, the other party may, by notice, fix upon and assign a reasonable time for completing the contract, and may call upon the defaulting party to do the acts to be done by him or any particular act within this period." Sec. 396: "The notice cannot be an arbitrary and sudden termination of the contract; it cannot put an immediate end to a pending dispute or negotiation as to the title; it must allow a reasonable length of time for the other party to perform, and if it fails in any of these respects it may be disregarded and will produce no effect upon the equitable remedial rights of the party to whom it is given. The nature and object of the contract, the circumstances of the case, and the previous conduct of the parties are important, and, indeed, controlling elements in determining the reasonableness of the notice."

Waterman on Specific Performance, section 465: "Although no time is fixed in the contract, a party will not be permitted to trifle with the interests of the opposite party by unnecessary delay; and the latter may designate some reasonable time, not capriciously, or unreasonably, or for the purpose of surprising the other and thus getting clear of a bargain, but a reasonable time according to the circumstances of the case, within which he will expect performance or that the agreement will be rescinded." See cases referred to in this section. See also *Murrell v. Goodyear*, 62 Eng. Ch. [1 DeG., F. & J.] 450. Parsons on Contracts, vol. 2 [5 Ed.] 662, says: "That is a reasonable time which preserves to each party the rights and advantages he possesses and

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protects each party from losses that he ought not to suffer."

In two other cases cited by plaintiff's counsel, a notice of intended rescission of the contract, in the one case of fourteen and the other of thirty days, was held unreasonable. In the light of these authorities, the notice served on plaintiff must be held wholly insufficient in point of time, and it should be thrown out of consideration on that account, and owing to the situation in which the parties had been placed in consequence of the then uncompleted agreement in reference to releasing the attachment liens.

About October 1, 1881, when these liens had been released, the agent of plaintiff saw the defendant again about the matter and wished to complete the contract, and offered to do so, but was met by the defendant with the reply that the contract was at an end. In the early part of January, 1882, a formal demand of a deed was made upon defendant, accompanied by a tender of the balance of the purchase money, but defendant refused to receive the money or to make the deed. The tender of the purchase money may really be regarded as having been made as early as October 1, 1881, and this was about the time the attachment liens were released, because where it is obvious, from the statements of the vendor, that he will not fulfill his part of the contract, all necessity of tendering the purchase money and demanding a deed are waived. *White v. Dobson*, 17 Gratt. 262; *Brown v. Eaton*, 21 Minn. 409; *Matlocks v. Young*, 66 Me. 459. But certainly, in the circumstances of this case, the actual tender was soon enough when made in January, 1882, for time had been waived, and delay, if any there was, excused. Plaintiff was in no wise responsible for any delay necessary to enable him to secure a title free from apparent blemish, and this is especially so where the delay is the result of the concurrence of the parties in interest. But aside

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from this view, aside from any agreement to remove the liens, it is sufficient if the delay is occasioned by facts which throw a cloud on the title and render it suspicious in the minds of reasonable men, and to any considerable extent affect its value. The delay in such a case cannot afford the vendor an opportunity to rescind because of the failure of the purchaser to make payment. *Snyder v. Spaulding*, 57 Ill. 480.

"Every purchaser of land has a right to demand a title which shall protect him from anxiety, lest annoying, if not successful, suits, be brought against him, and probably take from him, or his representatives, land upon which money was invested. He should have a title which would enable him not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value." Waterman Spec. Perf., sec. 412, and cases cited.

But there are other views which are fatal to the defence of the defendant, and they are the failure of the defendant to rescind the contract promptly. *Mellon v. Smith*, *supra*; and his failure, also, to return, or offer to return, the portion of the purchase money which he had received. *Snyder v. Spaulding*, *supra*; *Sanborn v. Batchelder*, 51 N. H. 434; *Guckenheimer v. Angevine*, 81 N. Y. 396. And it matters not that the amount retained was small, the principle involved is not affected thereby.

For these reasons the judgment should be reversed and the cause remanded. All concur, except Black, J., not sitting.

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LENOX et al., Appellants, v. HARRISON et al., Administrators.

1. **Administration : FINAL SETTLEMENT : EQUITY : PRACTICE.** It is only upon the ground that there has been a final settlement, binding and conclusive at law, that a proceeding in a court of chancery can be maintained to set the same aside upon the ground of fraud. And where the petition alleges that the administrator fraudulently failed and refused to publish notice of final settlement, the plaintiffs have no standing in equity, their remedy at law being ample and adequate.
2. **Practice : PLEADING.** A party must abide by the case made by his pleadings ; he can urge nothing inconsistent therewith or repugnant thereto.
3. **Presumptions.** Every one is presumed to govern himself by the rules of right reason, and to properly acquit himself of his engagements and his duty. And the same presumptions are indulged in favor of one occupying no official station, as in favor of one acting in an official capacity.
4. **Fraud : EVIDENCE : MOTIVE.** Evidence tending to show an absence of motive for fraud, or that no injury resulted from the fraud, even if any were committed, is competent to rebut a charge of fraud.
5. ——— : **PRACTICE.** In order to warrant a recovery upon the ground of fraud, there must be a concurrence of both fraud and injury.
6. ——— : ——— : **EQUITY : LACHES.** Equity views with disfavor suits brought after the death of one whose estate is sought to be charged, where the fraud alleged was known before such death, and the suit might have been brought during the lifetime of the party ; and where, without reason, the suit is delayed until after his death, such laches must be held fatal.

Appeal from Phelps Circuit Court.—HON. C. C. BLAND,
Judge.

AFFIRMED.

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J. B. Harrison and *D. H. McIntyre* for appellants.

(1) It was error to refuse to strike out the portion of the answer in which it was averred that the administrator had charged himself with nine hundred dollars interest in his final settlement by mistake. The administrator should not be allowed to deny his own solemn acts in this way. Defendants further plead the approval of the final settlement. Their pleas must be consistent. R. S., sec. 3523. The part of the answer setting up that the administrator was entitled to certain credits on his final settlement, on account of worthless notes which were not inserted in the settlement on account of inadvertence, should have been stricken out. *Williams v. Pettierew*, 62 Mo. 640. (2) The fact that nothing more was heard of the claims allowed in 1863, 1864, 1865 and 1866, after they were allowed, is sufficient to warrant the presumption of payment. *Baker v. Stonebraker's Adm'rs*, 36 Mo. 338, and authorities cited. These allowances had the force and effect of judgments. W. S. 103; *Smith v. Sims*, 77 Mo. 269. And they cease to be of any effect after ten years. R. S., sec. 2739; *George v. Middough*, 62 Mo. 549. (3) The administrator was chargeable with the rents collected by him. *Gamble v. Gibson*, 59 Mo. 585; *Dix v. Morris*, 66 Mo. 514. (4) The court erred in holding that the heirs had no interest in the subject matter of the suit. The surplus in the hands of the administrator at the time of final settlement, belonged either to the widow and the heirs or the creditors. The widow was not entitled to more than one-third of the rents, if to any. *Scribner on Dower*, secs. 15, 16, pp. 59, 60. She was barred by the statute of limitations at the time of bringing this suit. R. S., sec. 3230. And the creditors were barred by the statute which operated against the widow. The statute could not run against Mrs. Tangle and Mrs. Yost for the rea-

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son that they were under the disability of coverture at the time of final settlement, in 1874. R. S., sec. 3234. And continued up to the time suit was commenced, except Mrs. Wisbon, whose disabilities were removed in 1879. The statute could not run against Mrs. Perkins until 1877, as she was until that time under the disability of infancy, and had five years after that time in which to bring her action. Sec. 3234, *supra*; *Caho v. Endress*, 68 Mo. 224; *Farrish v. Cook*, 78 Mo. 212. (5) The plea of the statute of limitations set up by defendants, is almost the same as one condemned by this court on the ground that it did not confess and avoid. *Bauer v. Wagner*, 39 Mo. 385. The defendant must plead the statute if he rely upon it. 51 Vt. 106; 56 Miss. 346; Bliss on Code Pleading, sec. 355, and note. (6) Fraud may be inferred from tangible, responsible facts in proof. *Funkhouser v. Lay*, 78 Mo. 458. The notice of final settlement does not comply with the statute in its spirit and intent. W. S., sec. 16, p. 110; *Brashears v. Hecklin*, 54 Mo. 102. Taking the administration all through it seems to be tainted with fraud, and for that reason the settlement should be set aside. *Miller v. Major*, 67 Mo. 247.

L. F. Parker and *Smith & Krauthoff* for respondents.

(1) The motion to strike out part of defendants' answer, not being incorporated in the bill of exceptions, cannot be noticed by this court. *City of Jefferson v. Opel*, 67 Mo. 394; *Collins v. Barding*, 65 Mo. 496; *Robinson v. Hood*, 67 Mo. 640. (2) There is no equity in plaintiffs' bill. If the final settlement was made without notice, as alleged in the bill, it was but an annual settlement; the estate remains open and the settlement is open to attack in the probate court of Miller county—a court of law. *Picot v. Biddle's administrator*, 35 Mo. 29; *Baker v. Schoeneman*, 41 Mo. 391;

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State ex rel. v. Lankford, 55 Mo. 534; *Folger v. Heidel*, 60 Mo. 284. (3) In the present state of the case, the question of limitation does not materially affect it. *Nelson v. Brodhack*, 44 Mo. 596. (4) A final settlement made by an administrator has the force and effect of, and is a judgment of the probate court. *Jones v. Brinker*, 20 Mo. 87; *State v. Rowland*, 23 Mo. 95; *Whittlesey v. Dorsett*, 23 Mo. 236; *Mitchell v. Williams*, 27 Mo. 399; *Picot v. Biddle*, 35 Mo. 41; *Lewis v. Williams*, 54 Mo. 200; *Sheetz v. Kestly*, 62 Mo. 417. And such judgments have the force and effect of judgments of the circuit court. Freeman on Judgments, sec. 3190; *Johnson v. Beazley*, 65 Mo. 250. And the rule above invoked, that mere errors in a settlement, a failure by the administrator to make a charge which he should have made, or taking an erroneous credit without proof of some extrinsic, collateral, fraudulent act, will not justify a court of chancery in setting aside such judgment, has been repeatedly applied by this court to judgments of probate courts upon final settlements of administrators. *Mitchell v. Williams*, *supra*; *Picot v. Biddle*, *supra*; *Lewis v. Williams*, *supra*. It may be that there were errors, mistakes, but the doctrine is well and long settled that an allegation of fraud is not sustained by proof of mistake. Bigelow on Fraud, 491; *Mercer v. Lewis*, 39 Cal. 352; *Dudley v. Scranton*, 57 N. Y. 424. Nor by proof of simple illegality. Bigelow Frauds, 492. The case must fail even if grounded upon the theory of constructive fraud. (5) The notice in this case was in substantial compliance with the statute. R. S., sec. 238. (6) There is a defect of parties plaintiff in this, that all the parties to the judgment are not parties to the bill, either plaintiff or defendant. Story's Eq. Pleading [9 Ed.] sec. 72, p. 67. And objection will not be waived on this point where advantage is not taken by demurrer or answer in an equity case. The doctrine is stated by Judge Story, that if the proper parties are

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not made, the defendant may either demur to the bill or take the objection by way of answer, or when the cause comes on to hearing, he may object that the proper parties are wanting; or the court itself may state the objection and refuse to make the decree; or if a decree is made it may, for this very defect, be reversed on appeal. Story Eq. Plead., sec. 75; Calvert on Parties, chap. 2, sec. 4, pp. 113-116; 15 Ill. 251-4.

SHERWOOD, J.—This is a proceeding in equity to set aside and annul on the ground of fraud the final settlement of the estate of Wilson Lenox, deceased, made by Thomas C. Harrison, the administrator. Harrison died in 1880, and this proceeding was instituted in 1881. The alleged final settlement occurred in 1874. Upon the hearing of the cause the circuit court found that there was no equity in the plaintiffs' petition, and accordingly dismissed the same.

I. The plaintiffs allege in their petition that Harrison, the administrator, "fraudulently failed and refused to publish a notice to the creditors and parties, as aforesaid, of his intentions to make his final settlement at that term," etc. This allegation of itself shows that plaintiffs have no standing in equity, and no right or claim to equitable interposition in their behalf; for it is only on the basis of there being a final settlement, one binding and conclusive at law, that they have the privilege of coming into a court of chancery, and on the ground of fraud, etc., having their final settlement set aside; obviously, if, as alleged, there was no notice given as required by statute, then the final settlement was null, and the administration of the estate was still open. *Garton v. Bolts*, 73 Mo. 274. Consequently the remedy of the plaintiffs is ample and adequate at law. And plaintiffs must abide by the case made by their pleading, and can urge nothing inconsistent therewith or repugnant thereto. *Capital Bank v. Armstrong*, 62 Mo. 59, and cases cited.

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II. But on the merits it is not apparent that any error was committed by the lower court in reaching the conclusion which it did. The transactions, many of them, to which this suit relates, cover a long period of time, commencing with the grant of letters to Harrison in 1863. This suit was not brought till after his death. In 1881 the storehouse which he had formerly occupied was destroyed by fire, and many of the books and papers belonging to his estate were destroyed therein. The subject of the favorable presumptions which are indulged in behalf of persons acting in an official capacity, especially after a long lapse of time has intervened, has been quite extensively discussed in *Long v. Joplin M. & S. Co.*, 68 Mo. 422. In similar circumstances the like lenient presumptions are indulged in favor of persons who occupy no official station. Every one is presumed to govern himself by the rules of right reason, and consequently that he acquits himself of his engagements and his duty. 1 Phil. Evid., Cowen & Hill's notes, pp. 604-605, sec. 10. Moreover, defendants introduced evidence tending to show that Harrison was entitled to credits which, through inadvertence, he had not taken in his last settlement, and which, if taken in place of other credits to which he was not entitled, would have brought out the estate as his debtor in the sum of nearly one thousand dollars.

This was certainly evidence competent to rebut any charge of fraud by showing absence of any motive therefor, as well as no injury resulting from the fraud, even if there were any. In order to warrant a recovery, or the granting of relief on the ground of fraud, there must be a concurrence of both fraud and injury. *State ex rel. v. West*, 68 Mo. 229. And equity views with disfavor suits that are brought after the death of the party whose estate is sought to be charged, where the fraud alleged is known before, and suit might have been brought during the lifetime of the party acquainted

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with the whole business, but without reason or excuse such suit is delayed till after his death.

In the case just cited it was said: "Under such circumstances the laches must of itself be held fatal, for it would be to assert a doctrine to the last degree hazardous to say that a complainant, with full knowledge of all the facts on which he relies, can lie quietly by until death comes to his assistance and puts the seal of perpetual silence on the lips of his adversary."

And the idea, that the death of a party against whom fraud is charged, and against whose representatives suit is brought, which might have been brought before, frequently forms a very important constituent element in determining the question of laches, is no new doctrine under the sun. Speaking on this point, in *German-American Seminary v. Kiefer*, 43 Mich. 105, Cooley, J., said: "It would be the height of injustice to permit complainant, with full knowledge of the facts, to delay suit while the persons who were familiar with the facts were one by one passing away, and at last bring suit under circumstances which, at best, must leave the court in doubt whether the remaining evidence does not disclose a partial, defective, and misleading case. A court of equity ought to refuse interference under such circumstances. *Campau v. Van Dyke*, 15 Mich. 371; *Russell v. Miller*, 26 Mich. 1." Abundant authorities can be found in support of this position, in addition to those already cited: 1 Fonbl. Eq. 245, note, and cases cited.

Looking, then, to the face of the petition, no showing is made why equity should interfere, and looking to the merits of the cause, and deferring somewhat to the trial court, and considering all the circumstances of the case, the safest course to pursue would seem to be to affirm the judgment. All concur.

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SHARP V. CHEATHAM, *Appellant*.

1. **Party Wall : CONTRACT : EQUITABLE EASEMENT.** Where owners of adjoining premises made an agreement under seal for themselves, but not acknowledged and recorded, whereby one was to build a party wall, and the other, when he should use it in the construction of his building, was to pay half the cost of such wall, the effect of such agreement was to create cross-easements as to each owner, and a purchaser of the estate with notice, would take it burdened with the liability to pay one-half the cost of the wall whenever he should avail himself of its benefits.
2. ——— : ——— : ——— : **NOTICE.** One purchasing under a quit-claim deed, would not, without actual notice, be bound by such agreement.

Appeal from Johnson Circuit Court.—HON. NOAH M. GIVAN, Judge.

REVERSED.

O. L. Houts for appellant.

(1) The contract sued on was a personal covenant; did not run with the land or create a privity of estate between the original parties or their grantees, the parties to this action. Wash. on Real Prop. [3 Ed.] top pp. 261, 262, 233, side pages 15, 16, and cases cited; *Cole v. Hughes*, 54 N. Y. 444. (2) The original parties to the contract sued on intended only to bind themselves and only employed terms to that end. They did not bind their representatives and assigns, and the law will not thus contract for them. *Wiggins Ferry Co. v. Ry. Co.*, 73 Mo. 389. (3) But if the contract runs with the land, defendant is not bound thereby unless he had notice thereof. *Houx v. Seat*, 26 Mo. 178; *Abraham v. Krantler*, 24 Mo. 69. (4) Defendant had no actual notice of the contract. His quit-claim deed vested title in him without constructive notice. The instrument relied on

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was neither recorded nor entitled to record, as it must have been to affect defendant's lot and him with constructive notice. *Fox v. Hall*, 74 Mo. 315; *Boogher v. Neece*, 75 Mo. 383; *Willingham v. Hardin*, 75 Mo. 429.

W. W. Wood for respondent.

(1) A covenant of the kind in controversy in this action runs with the land, and is binding upon the grantee of the party using the wall. *Brown v. Pentz*, 1 Abb. [N. Y.] 227; *Burlock v. Peck*, 2 Duer, 90; *Savage v. Mason*, 3 Cush. 500; *Richardson v. Tobey*, 121 Mass. 457; *Branson v. Caffin*, 108 Mass. 175; s. c., 118 Mass. 156; *Roche v. Ullman*, 104 Ill. 11. And a covenant of this kind is binding upon the assigns of the covenantor without their being expressly named. (1 Wash. on Real Prop. [3 Ed.] p. 437, side p. 330.) (2) But whether or not the covenant runs with the land, respondent's property is subjected under the agreement to the burden of the use of the wall for the benefit of appellant's premises and she is equitably entitled to be compensated therefor. *Platt v. Eggleston*, 20 O. St. 414; *Keteltas v. Penfold*, 4 E. D. Smith, 133; *Standish v. Lawrence*, 111 Mass. 111; *Trustees v. Lynch*, 70 N. Y. 441; *Maine v. Cumston*, 98 Mass. 317; *Richardson v. Tobey*, 121 Mass. 451, 459; *Roche v. Ullman*, 104 Ill. 11; *Landers v. Martin*, 2 Lea [Tenn.] 213. (3) The appellant claims solely under a quit-claim deed, and he cannot avail himself of the defence that he is a *bona fide* purchaser without notice. The deed did not pass any more title than the grantor had, and only what the grantor could lawfully and equitably convey. And the title he acquired is subject to all equities. He was by the face and terms of the deed notified and put upon enquiry for all equities affecting the property conveyed. Washb. on Real Prop, vol. 3, p. 375; *May v. Leclerc*, 11 Wall. 232; *Ridgeway v. Holliday*, 59 Mo. 444; *Stoffel v. Schroeder*, 62 Mo. 150. The rule laid down in the case of *Fox v. Hall*, 74 Mo.

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315, is not applicable to the facts of this case. Cheatham did not give full value for the property. Elliott's testimony proves clearly that he expressly refused to make a warranty deed, because he was not getting full value. (4) Upon another well settled principle of law, the question of notice must be decided in favor of respondent. When appellant purchased the lot he found plaintiff in possession of six inches of the same, and using it for the support of her wall, and was thereby put upon his enquiry as to the character of her possession and rights thereunder. *Vaughan v. Tracy*, 22 Mo. 415, 421; *Martin v. James*, 72 Mo. 23; *Hardy v. Summers*, 32 Am. Dec. 167; *Knox v. Thompson*, 13 Am. Dec. 246, and note; *Wade on Notice*, sec. 279.

SHERWOOD, J.—Plaintiff instituted this proceeding in equity on the following contract :

“Article of agreement, made and entered into this seventh day of July, 1868, by and between Roach & Stitt and Austin Elliott, all of the town of Warrensburg, county of Johnson and state of Missouri. Witnesseth: That the said Austin Elliott, party of the second part, hereby agrees that the said Roach & Stitt, party of the first part, shall place the walls of their building, now in process of erection, six [6] inches on the lot now owned by the party of the second part : and the said party of the second part further agrees that when he shall join said walls he will pay to the party of the first part, one-half the cost of so much of said walls as he may join to.

“In witness whereof, we have hereunto set our hands and affixed our ———, this day and date above named.

“ROACH & STITT, [L. S.]

“AUSTIN ELLIOTT. [L. S.]

“Attest: M. M. GLADDISH.”

The substance of the petition is that Roach & Stitt and Elliott, the owners respectively of adjoining lots in

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Holden's second addition to the town of Warrensburg, made the agreement aforesaid ; that subsequently Roach & Stitt, in compliance with said agreement, proceeded to erect and did erect a wall along the line between the two lots, and six inches on the land of Elliott, for ninety feet in length, etc. ; that afterwards Elliott erected a building on his lot, sixty feet in length ; that Roach & Stitt afterwards conveyed their lot to plaintiff, in March, 1881 ; that Elliott in the next month thereafter, conveyed by quit-claim deed, his lot to defendant, who afterwards erected on it a brick extension of the building previously erected by Elliott, and joined and connected the same with the line and party wall theretofore erected by Roach & Stitt, using thereby said wall to the extent said building was joined thereto, some thirty feet in length and sixteen feet in height ; that defendant when he purchased his lot had notice of the agreement entered into as aforesaid by Elliott and by Roach & Stitt ; that the cost of the wall to which defendant joined his building was two hundred dollars ; that defendant was equitably bound to pay plaintiff one-half of that sum, but refuses to do so, and, therefore, plaintiff asks that defendant be decreed to pay plaintiff one-half the cost of said wall, etc.

The agreed statement of facts was filed, which, together with the deposition of Elliott, was all the evidence in the cause. The fact of notice to defendant of the agreement aforesaid, was not established ; the substance of the other allegation of the petition, was, however, made out. Whereupon the circuit court made a special finding, whereby it was held that defendant had no actual notice of the agreement, yet that having purchased under a quit-claim deed, had constructive notice of the agreement, and, therefore, rendered judgment against him, and decreed that the amount of such judgment should be a lien on his property described in the petition.

The only question presented then by the defendant's appeal is the correctness of the ruling just mentioned.

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This question will be discussed from two points of view: (1) In respect of the general powers of a court of equity to enter such a decree as has been entered in the present instance. (2) Whether conceding the existence of such powers, it was proper to exercise them in the case at bar, owing to the fact, found by the trial court, that defendant had no actual notice of the agreement at the time he received his deed.

I. Were this *an action at law* there would be little or no doubt that plaintiff could not successfully maintain her action. An author of eminence touching this subject says: "With a very few exceptions, the uniform current of authorities, from the time of *Webb v. Russell*, 3 T. R. 393, to the present day, requires a *privity of estate* to give one man a right to sue another upon a covenant where there is no privity of contract between them; consequently that where one who makes a covenant with another in respect to land, neither parts with nor receives any title, or interest in the land, at the same time with and as a part of making the covenant, it is at best a mere personal one, which neither binds his assignee, nor enures to the benefit of the assignee of the covenantee, so as to enable the latter to maintain an action in his own name for a breach thereof." 2 Wash. [4 Ed.] top p. 285. And the learned author then quotes with approval, the remarks of Erle, J., in *Cole v. Hughes*, 54 N. Y. 444, where he says: "There is a wide difference between the transfer of the burden of a covenant running •with the land and the benefit of the covenant, or, in other words, of the liability to fulfill the covenant and the right to exact the fulfillment. The benefit will pass with the land to which it is incident; but the burden or liability will be confined to the original covenantor, unless the relation of privity of estate or tenure exists or is created between covenantor and covenantee at the time when the covenant is made." As no such privity of estate or tenure existing between the contracting parties

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when the agreement heretofore set forth was made, it is quite clear from the authorities cited, that plaintiffs' action, if one of law, must fail.

This, however, being a proceeding in equity, the rules prevailing in actions at law, as to the necessity of the covenant running with the land; as to the necessity of there being a contemporaneous privity of tenure or estate, in order to make the covenant something more than a mere personal one, in order to fasten it upon the land mentioned in the covenant, does not prevail here, as in contemplation of a court of equity no such privity is essential, nor that the covenant should run with the land. In order to successfully invoke equitable interposition in cases of this sort, all that is necessary is a valid agreement or covenant, and notice thereof to the purchaser. When these things are shown, a court of equity, disregarding the technical rules of law, and looking alone to the substance and justice of the agreement, such as the one now before us, will enforce it as well against the purchaser with notice as against the original party. Cases are quite frequent which illustrate and fortify this position. Some of them do so in direct terms of adjudication; others of them by necessary analogy and irresistible inference.

Thus, in the early case of *Campbell v. Mesier*, 4 Johns. Ch. 334, two parties living in the city of New York, on adjacent lots and having on the common line of their buildings a ruinous party wall unfit to stand, and one of the persons thus situated being desirous of rebuilding, proposed to the other co-terminous proprietor to unite with him in rebuilding the party wall, but this request was refused. Whereupon, Campbell, the proposer, proceeded to tear down his own house as well as the party wall, and rebuilt both. Thereafter, Mesier, who had refused to assist in rebuilding the party wall, devised his property to his son, who thereafter sold the lot to Dunstan, and in the deed expressly conveyed to the

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latter the use of the party wall for building, etc., and covenanted to indemnify him forso using it. Dunstan then pulled his house down and erected a new one, and in so doing made use of the new party wall; but refused to pay his proportionate share of that wall. Campbell then sued him in an ordinary action, but was non-suited on the ground that he had no remedy at law. On this, Campbell filed his bill against both Mesier and Dunstan, praying that the defendants be decreed to come to a settlement with him touching the building of the party wall, and to contribute and pay one-half of the value thereof, etc. Upon this state of facts the prayer of the bill was granted, and a decree entered accordingly, Chancellor Kent remarking: "I have not found any adjudged case in point, but it appears to me, that this case falls within the reason and equity of the doctrine of contribution which exists in the common law, and is bottomed and fixed on general principles of justice. In *Sir William Harbert's case* [3 Co. 11] and in *Bro. Abr.*, tit. *Suite and Contribution*, many cases of contribution are put, and the doctrine rests on the principle, that where the parties stand *in equali jure*, the law requires equality, which is equity, and one of them shall not be obliged to bear the burden in ease of the rest. It is stated in F. N. B. 162*b*, that the writ of contribution lies where there are tenants in common, or who jointly hold a mill, *pro indivisa*, and take the profits equally, and the mill falls into decay, and one of them will not repair the mill. The form of a writ is given to compel the other to be contributory to the reparations. In *Sir William Harbert's case*, it was resolved, that 'when land was charged by any tie, the charge ought to be equal, and one should not bear all the burden; and the law on this point was grounded in great equity.' * * * The doctrine of contribution is founded, not on contract, but on the principle that equality of burden as to a common right, is equity, and the solidity and necessity of this doctrine

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were forcibly and learnedly illustrated by Lord Ch. Baron Eyre in the case of *Dering v. Earl of Winchelsea*, 1 Cox's Cases, 318. * * * The obligation arises not from agreement, but from the nature of the relation, or *quasi ex contractu*; and as far as courts of law have, in modern times, assumed jurisdiction upon this subject, it is, as Lord Eldon said [14 Ves. 164] upon the ground of an implied *assumpsit*. The decision at law, stated in the pleadings, may, therefore, have arisen from the difficulty of deducing a valid contract from the case; that difficulty does not exist in this court, because we do not look to a contract, but to the equity of the case as felt and recognized according to Lord Coke in every age, by the judges and sages of the law." And the cause was referred to a master to ascertain the cost of the wall. Afterwards, the cause coming on again before the chancellor, he ruled that the expense of rebuilding the wall was an *equitable charge on the wall*, and the owner, for the time being, exercising his right in the new wall, was equitably bound to contribute ratably to the expense of the necessary reparation. And Dunstan having purchased with actual notice of the charge or claim, was ordered to pay the moiety of the expense of rebuilding the wall.

In *Rindge v. Baker*, 57 N. Y. 209, two adjoining proprietors entered into a *parol* agreement to jointly build a party wall, one-half on the premises of each, and accordingly built a portion of the wall, but one of them refused to proceed; the other having planned his building in reliance on the contract being performed, was held not confined to his remedy for specific performance, but might go on and complete the wall, and in an equitable action recover of the other proprietor one-half of the expense. In *Huck v. Flentye*, 80 Ill. 258, two adjoining proprietors, without any express agreement as to who should pay for the party wall, agreed to rebuild together, and did so, and one of them having built the entire party

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wall, was held entitled to recover, in an action of *assumpsit* one-half of the expense from the other proprietor, and this ruling was placed on the ground of contribution, and of an implied promise. In *Sanders v. Martin*, 2 Lea [Tenn.] 213, where one owner of a party wall made additions to it for his own convenience, and the co-owner afterwards used such additions when enlarging her own building, it was held on bill brought by the first party, that he could compel contribution from the other for one-half the expense of such additions. The case of *Platt v. Eggleston*, 20 Ohio St. 414, was one where W, the owner of a lot sold and conveyed one half of it to P, agreeing at the same time, in a separate writing, not under seal, that P might erect one-half of the wall of his building on the part of the lot retained, and that W, when he should sell the residue of the lot, would require that the purchaser or his assigns, when they should use the party wall, pay one-half of the expense to P, or his assigns. P built on his lot, and after that conveyed it "with the appurtenances," etc., with full covenants of warranty to E. W, afterwards, conveyed by deed of *release* to C, the remainder of the lot, without requiring him or his assigns to pay for the moiety of the expense of the party wall, when he should build, nor is it stated that C was aware of the agreement previously made. C thereupon built on his portion of the lot thus purchased, and in building used the party wall, and was held in an equitable proceeding by Eggleston, that the effect of the agreement was to give to Platt and his assigns a right in equity to an easement for the support of one-half of the wall on the premises retained by W; that it was immaterial that the agreement was not inserted in the deed to Platt, nor that it was not under seal, nor that it was not a covenant running with the land; that as the first lot sold was liable to be subjected under the agreement to the burden of the use of the wall for the benefit of the adjoining premises, Eggleston, the then owner, was equi-

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tably entitled to compensation for the one-half of such wall; and that this right of compensation passed as an appurtenance by the deed from W to Platt, and from the latter to plaintiff in the same way.

A case, however, similar in all its essential incidents to the one at bar, is that of *Roche v. Ullman*, 104 Ill. 1, where it was ruled in a proceeding in equity that where owners of adjoining premises made an agreement under seal for themselves, heirs and assigns, whereby one is to build the party wall, and the other, when he uses it in the construction of his building, is to pay half of the cost of such wall; that the effect of such agreement is to create *cross-easements* as to each owner, which bind all persons succeeding to the estates to which the easements are appurtenant, and a purchaser of the estate of the owner so contracting, would take it burdened with the liability to pay one-half the cost of the wall, whenever he availed himself of its benefits. The only difference which can be suggested between the case just cited and the present one, is that the agreement in the latter does not contain the word "*assigns*;" but this, as will be presently shown, is not material.

Other cases may be found which support the view already announced in the remarks heretofore made and in the authorities already cited, that such agreements as those under discussion, are *equitable easements* or *servitudes*, constituting charges on the land, and capable of enforcement in equity, against the land itself, where the agreement or covenant is of an affirmative character, or of being enforced in other appropriate modes where the agreements are negative or restrictive in their nature. Thus, where adjoining owners of lands by mutual covenants imposed certain conditions on their respective lands as to the character of the buildings which should be erected on those lands, it was held that equity would enjoin the parties or those claiming under them with notice, from any violation of such covenants; that such covenants con-

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stituted reciprocal easements impressed upon the lands; and that whether there was any privity of estate between the mutual covenantors and covenantees; whether the covenant was one running with the land or a collateral covenant, or a covenant in gross, or whether an action at law could be sustained upon it, was not material as affecting the jurisdiction of a court of equity in affording relief upon a disturbance of the easements created by the original contracting parties. Allen, J., among other things, remarking: "The language of courts and of judges has been very uniform and very decided upon this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which could be enforced in equity against him, takes the title subject to all easements, equities and charges however created of which he has notice." *Trustees v. Lynch*, 70 N. Y. 450, and cases cited. Lord Cottenham when speaking of such covenants, said in *Tulk v. Moxhay*, 2 Phil. [Eng. Ch. 774]: "If an equity is attached to property by the owner, no one purchasing with notice of that equity, can stand in a different situation from the party from whom he purchased."

The distinction between the binding obligation at law of covenants not running with the lands, and the equitable rights which equity enforces in such cases, is recognized by the author of the American note to *Spencer's case*, vol. 1, pt. 1, 1 Smith's Lead. Cas. [6 Am. Ed.] 167. He says, when speaking of such covenant: "But although the covenant when regarded as a contract, is binding only between the *original parties*, yet, in order to give effect to their intention, it may be construed by equity as creating an *incorporeal hereditament* (in the form of an easement) out of the unconveyed estate, and rendering it appurtenant to the estate conveyed; and when this is the case, subsequent assignees will have the rights and be subject to the obligations which the title or liability to such easement creates." See also, treating of

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the same subject, *Parker v. Nightingale*, 6 Allen, 341; *Whitney v. Ry.*, 11 Gray, 359; *Kirkpatrick v. Peshime*, 24 N. J. Eq. 206; *Burbank v. Pillsbury*, 48 N. H. 475; *Norfleet v. Cromwell*, 70 N. C. 634. And it is quite immaterial, so far as equitable interposition and relief are concerned, whether the covenant or agreement be *affirmative* or *restrictive* in its character. 3 Pomeroy's Eq. Jur. sec. 1295 and notes; 2 *Ib.* sec. 689 and cases cited. Frequent instances are given by the learned author just cited of the enforcement of both kinds of covenants, and he says: "I have, as it will be seen, continued to state the doctrine in its most general form as applying to affirmative as well as to restrictive covenants, and as rendering the owner liable to the affirmative duty of specifically performing the covenant, as well as to the negative remedy of restraint from violating it, notwithstanding the very recent decisions by the English Court of Appeals, holding that the doctrine applies only to *restrictive* covenants, and does not extend to those which stipulate for affirmative acts. In my opinion, the doctrine has been fully established, in its most general form, without such limitation, by the overwhelming weight of authority, English and American." *Ib.* sec. 1295. And there would seem to be but little of either justice or sound reason in the doctrine which enforces the equities arising from the agreement of parties to refrain from doing certain acts towards a certain subject-matter, and yet refuses to enforce a similar agreement by compelling the performance of acts embraced within its terms.

It has already been stated that it was immaterial that the agreement in question did not contain the word "*assigns*." This point has been so ruled in the case of *Wilson v. Hart*, 2 H. & M. 551 [Eng. V. Ch.], where the covenant was restrictive in its character, and bound the purchaser, *not naming assigns*, that no building erected or to be erected, should be used for certain purposes, and it was held that the *assignee* of such purchaser,

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having notice of the covenant would be bound thereby in equity and required to perform it, notwithstanding it was also ruled that the covenant was a mere *personal* engagement, and did not run with the land. Applying the principle announced in that case to the present one, the lack of the word mentioned cannot affect the result. And aside from any precedent to that effect, if in consequence of the agreement of the original parties an equitable burden, servitude or easement was created on the land conveyed to defendant, he, if having notice thereof, was of necessity, and on the most familiar of all equitable principles, bound thereby. As is aptly said by Bigelow, J., in *Parker v. Nightingale*, *supra*: "A purchaser of land, with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate of which he had notice when he became the purchaser."

II. Now, as to the question of notice to the defendant. He took under a quit-claim deed from his grantor; this, according to a large number of authorities, both in this state and elsewhere, would constitute him a purchaser with notice. *Ridgeway v. Holliday*, 59 Mo. 444; *Stoffel v. Schroeder*, 62 Mo. 147; *Slivels v. Horne*, *Ib.* 473; *Mann v. Best*, *Ib.* 491; *Oliver v. Piatt*, 3 How. [U. S.] 333; *May v. Le Claire*, 11 Wall. 217; *Bragg v. Paulk*, 42 Me. 502; *Smith v. Dunton*, 42 Iowa, 48; *Watson v. Phelps*, 40 *Ib.* 482; *Springer v. Bartle*, 46 *Ib.* 688; *Thorp v. Coal Company*, 48 N. Y. 253; *Marshall v. Roberts*, 18 Minn. 405; *Rogers v. Burchard*, 34 Tex. 441. In addition to defendant being a purchaser under a quit-claim deed, it is to be noted that he did not give full value for the lot. Elliott says: "Told him I wouldn't make anything but a quit-claim deed *at that price*." Moreover, the case of *Fox v. Hall*, 74 Mo. 315,

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does not apply to the agreement in question, for the instrument which evidenced it was not in such shape as entitled it to registry, and, therefore, defendant, taking under a conveyance of the kind he did, will be presumed, under that ruling, to have notice of the agreement, although he would not have had notice had it assumed such shape as entitled it to be put to record. It must be confessed that the reasoning which leads to such incongruous results is not very well calculated to satisfy the judgment. It may be remarked, also, that Fox, the plaintiff in that case, would not have been within the protection of the registry act, *even had his deed been one with full covenants of warranty*, since, according to the case stated, he was not a purchaser for value. The ruling there made should, therefore, be regarded as *obiter*.

But whatever may be thought of its abstract correctness, it does not apply here for the reasons already given, and in consequence of this the defendant must be held as a purchaser with notice of the equitable easement or servitude created on the lot he bought, and that whenever he availed himself of the privileges of the party wall, by adjoining his building thereto, he did so only upon the equitable terms of sharing the burden while he shared the benefit.

Therefore, the judgment should, in my opinion, be affirmed. Norton, J., concurs in affirming the judgment in so far as the result. Henry, C. J., Ray and Black, JJ., concur as to the first paragraph of this opinion, but as to the second one they hold that the defendant was a purchaser without notice. This leads to a reversal of the judgment and the remanding of the cause.

Deere v. Marsden.

DEERE *et al.*, Appellants, v. MARSDEN, Interpleader.

1. **Promissory Note:** HOLDER FOR VALUE. One who takes a note as collateral security for a debt then created is a holder for value.
2. ——— : ———. So one will be a holder for value who so takes a note for a pre-existing debt, if there is an express agreement on his part to forbear suit until the collateral shall mature.

Appeal from Jefferson Circuit Court.—HON. J. W. EMERSON, Judge.

AFFIRMED.

Chas. A. Davis and W. H. H. Thomas for appellants.

(1) The court erred in refusing instruction asked for by plaintiffs, as it contained the law governing the case. (2) The evidence does not disclose that the mortgage here in controversy, given by Jones, the defendant, to Marsden, the interpleader, was given for value, or for any consideration other than a past or antecedent debt. (3) The mortgage is nothing more than a collateral security. (4) In the case at bar there can be no distinction between an attaching creditor and a judgment creditor. (5) It is a well and long settled principle of the Supreme Court of this state, that, "a party to whom negotiable paper is transferred merely as collateral security, will hold it subject to all the equities existing between the original parties." *Goodman v. Simonds*, 19 Mo. 107; 2 Mo. App. 490.

Dinning & Byrnes for interpleader.

(1) Revised Statutes, section 2353, does not give the vendor a lien upon the property sold. It only confers upon

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him the right to levy his execution upon it except in the hands of an innocent purchaser for value received, without notice of the existence of such prior claim for purchase money. The interpleader was an innocent purchaser for value and without notice within the meaning of said section. (2) The note given by Jones to the interpleader extended the time of the payment of the former's indebtedness and the interpleader was, therefore, a purchaser for value. Jones on Chattel Mortgages, sec. 81; *Smith v. Worman*, 19 Ohio, 145; *Kranert v. Simon*, 65 Ill. 344; *Wright v. Bundy*, 11 Ind. 398; *Paine v. Benton*, 32 Wis. 491; *Butters v. Haughwout*, 42 Ill. 18.

BLACK, J.—The plaintiffs instituted this suit by attachment against Thomas J. Jones on a note for one hundred dollars. The officers levied upon two buggies and a wagon as the property of Jones. R. Marsden interpleaded for the property and had judgment therefor. Plaintiffs sold the property to Jones on the twenty-sixth of June, 1882, and it is admitted that the note sued upon was given for the balance of the purchase price of the property. It is also agreed "that on the twenty-fifth day of September, 1882, Thomas J. Jones was largely indebted to R. Marsden, the interpleader, by debts due directly from him to said R. Marsden. He, the said Thomas J. Jones, on the twenty-fifth day of September, A. D., 1882, executed a note for seven hundred dollars and a chattel mortgage to secure said note for said past indebtedness, and said R. Marsden took possession of said property under said mortgage, and default in payment of said note had been made, and was proceeding to sell the same when the levy was made in this cause." This was all the evidence.

The plaintiffs asked the court to declare the law to be that interpleader was not a purchaser for value, which was refused. The propriety of this ruling is the only question urged in this court, and from the pleadings and

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instructions it would seem to be the only question presented in the trial court. Plaintiffs claim the property by virtue of section 2353, Revised Statutes, 1879.

One who takes a note as collateral security for a debt then created is a holder for value. *Logan v. Smith*, 62 Mo. 455. As to a pre-existing debt, if there is an express agreement on the part of the creditor to forbear suit until the collateral shall mature, the agreement to delay constitutes the transferee a holder for value. *Dan. Neg. Inst.* [3 Ed.] section 829; *Oates v. Nat'l. Bank*, 100 U. S. 247. The extension of time for the payment of the past indebtedness, if for a day only, constitutes a new and sufficient consideration. *Smith v. Worman*, 19 Ohio St. 148. The agreed facts in this case are far from being clear, but taking them in connection with the pleadings, we conclude some time was given Jones by the note taken from him by Marsden for the past indebtedness. This being so, Marsden was clearly a purchaser for value. *Goodman v. Simonds*, 19 Mo. 107, only holds that one who takes a bill merely as a collateral security for a pre-existing debt, having given no value or consideration for it, holds it liable to the equities of the original parties.

The judgment is affirmed. All concur.

STOLLER et al. v. COATES, Assignee, Appellant.

1. **BANK: TRUST FUND: RELATION OF CREDITOR AND DEBTOR.** The Mastin Bank of Kansas City received a draft on deposit to the creditor of the depositors, and thereupon the latter drew their check on the bank, with the request that it should place the proceeds of the same in the Exchange Bank of Denver, Colorado, to the credit of one E, which the Mastin Bank agreed to do. The Exchange Bank was a correspondent of the Mastin Bank, and the latter bank gave the depositors a memorandum addressed to the Exchange

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Bank, stating that the account of the latter had been credited with the amount of the check to the use of E. The memorandum was at once sent by the depositors to E, and the Mastin Bank also sent a copy of the same by mail to the Exchange Bank, but before it arrived the Mastin Bank had closed its doors and made an assignment for the benefit of its creditors. The Exchange Bank refused to charge the amount to the Mastin Bank, or to place it to the use of E, or to pay the same to him. *Held*, the Exchange Bank having so refused to accept the credit, the fund remained in the Mastin Bank impressed with the trust, and the relation of general creditors was not created between the depositors and the Mastin Bank.

2. **Trust Fund, CONVERSION OF: PREFERRED DEMAND.** The general assets of the Mastin Bank having received the benefit of the unlawful conversion, the bank is chargeable with the amount of the converted fund as a preferred demand.
3. —, **DIVERSION OF.** While it may be impossible to follow a fund into its diverted use, it is always possible to make it a charge upon the estate or assets to the increase or benefit of which it had been appropriated.
4. **Estoppel.** The allowance, however, in favor of the plaintiffs of their claim as a debt against the general assets of the bank, estops them to claim in equity for the conversion of a trust fund.

Appeal from Jackson Circuit Court.—HON. TURNER A. GILL, Judge.

REVERSED.

Karnes & Ess for appellant.

- (1) The relation between the plaintiffs and the Mastin Bank was not a trust, but one of debtor and creditor.
- (2) The money sought to be recovered in this action was first deposited with other money, by Stoller & Hill, to their credit. A check was then drawn for the purpose of placing in the Exchange Bank of Denver, for Earnest, the net proceeds of his cattle. Whatever may have been then said, it is certain that the money, as a matter of fact, remained in the Mastin Bank to the credit of the Exchange Bank, and while thus entering into and constituting a part of the entire balance of assets and liabilities

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ties of the Mastin Bank, the transfer was made to the assignee. If a trustee has converted a trust fund into money and mingled the proceeds with his other moneys, so that they are undistinguishable, the *cestui que trust* cannot follow his funds into the hands of an assignee, or of an executor of such trustee, but must occupy the position of a general creditor of the estate. *Mills v. Post*, 76 Mo. 426; s. c., 7 Mo. App. 519; *Bank v. Bank*, 15 Fed. Rep. 858; *People v. Bank*, 78 N. Y. 269; *Bank v. Russell*, 2 Dillon, 215; *In re Coan Mfg. Co.*, 12 N. B. R. 203; *Story's Eq. Jur.*, secs. 1258-9; *Kip v. Bank*, 10 Johns. 62; *Trecothick v. Austin*, 4 Mason, 29; *Thompson's Appeal*, 22 Pa. St. 16; *Whitcomb v. Jacob*, 1 Salk. 160.

L. C. Slavens for respondents.

(1) The Mastin Bank took the money in trust under instructions to place it in the Exchange Bank, and it makes no difference why they failed to do it, if they did fail, the trust relation still exists. (2) When plaintiffs gave their check to the Mastin Bank for the net amount to be sent to the Exchange Bank, it was equivalent to drawing out the actual money and handing it back to the Mastin Bank for that purpose. The money did not pass to Coates by the assignment, because the bank did not own it; it simply held it in trust to do with it as Stoller & Hill had directed it to do. *City v. Johnson*, 5 Dillon, 241. (3) The fact that plaintiffs proved up their claim before the assignee will not defeat their recovery in this action. *Bank v. Coates*, 3 McCrary, 9.

MARTIN, C.—This is a suit in equity to compel the defendant to pay over to plaintiffs the sum of \$3,757.67 in full, that being the amount of a fund received by the Mastin Bank in trust for plaintiffs before its failure, and not vesting in the defendant, as assignee, for general creditors.

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In July, 1878, one F. P. Earnest, of Colorado, consigned to plaintiffs, under the firm name of Stoller & Hill, of Kansas City, ten car loads of cattle, for the purpose of being sold for his account. Stoller & Hill were requested, by instructions accompanying the consignment, to deposit the proceeds of sale in the Exchange Bank of Colorado, to his, the consignor's, credit. The gross proceeds of sale amounted to \$3,769.75, in the form of a draft. With this draft, Mr. Hale, book-keeper of Stoller & Hill, repaired to the Mastin Bank for the purpose of carrying out the instructions of the consignor as to remission of the proceeds. The net proceeds payable to the consignor were a little less than the draft, so that it became necessary to take the surplus from the draft, or amount of gross proceeds. Accordingly, the draft was deposited to the credit of Stoller & Hill, and immediately thereafter Mr. Hale drew the partnership check of his principals in the sum of \$3,757.56, that being the net proceeds to be transmitted to the consignor in Colorado. This check, payable to the bank or to Stoller & Hill, and indorsed by them, was delivered to the bank, with the request that they (the bank) should place the proceeds thereof in the Exchange Bank of Denver, in Colorado, to the credit of Mr. Earnest, the consignor. Mr. Hale testifies that the bank, through its agent, Mr. Boardman, now deceased, agreed to do this. The difficulty presented in the case arises from the method adopted by the bank, presumably with the approbation of Mr. Hale, to transmit the funds. The Exchange Bank of Colorado was a correspondent of the Mastin Bank; accordingly that bank handed to Mr. Hale the following receipt, or memorandum, addressed to the Exchange Bank:

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"THE MASTIN BANK, }
"KANSAS CITY, Mo., August 1, 1878. }

"Exchange Bank of Denver, Colorado:

"Your account has credit \$3,757.56, deposited by
Stoller & Hill, for the use of F. P. Earnest.

"Very respectfully,

"JOHN J. MASTIN, Cashier.

"Per J. A. BOARMAN, Teller."

Stoller & Hill at once sent this memorandum to Mr. Earnest, and the Mastin Bank sent a copy of the same by mail to the Exchange Bank, at Denver. Before it reached the Exchange Bank, the Mastin Bank had closed its doors and made an assignment to the defendant for the benefit of its creditors. The Exchange Bank refused to charge the amount to the Mastin Bank, or to place it on its books to the use of Mr. Earnest. It refused to recognize Earnest as having any claim for such credit, or to pay him the amount thereof.

If the Mastin Bank had remained solvent, it is probable that the credit of that bank would have been allowed to take the place of the actual funds, and that the amount would have been entered to the use of the consignor. Mr. Earnest, the consignor, sued Stoller & Hill for the proceeds of his cattle, and recovered judgment, which has been paid. Stoller & Hill, having thus satisfied the claims of their principal, stand in his place, besides having rights of their own as dealers with the bank respecting the fund. Mr. Boarman, the teller of the Mastin Bank, is dead, and his version of the transaction is wanting. According to the books of the bank, the sum of \$3,757.56 appears therein to the credit of the Exchange Bank of Denver, for the use of Earnest. It seems that Stoller & Hill proved up, before the assignee, their claim against the Mastin Bank in the name of the Exchange Bank of Denver, and received dividends thereon, which

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they have credited upon their present claim, in the sum of \$450.90. On these facts the court rendered judgment for plaintiffs in the full amount of their claim less the credits thereon, from which the defendant appeals.

I. It is contended by defendant that the fund claimed by plaintiffs was, with their consent, deposited in the Mastin Bank to the credit of the Exchange Bank of Denver, for the use of Earnest, and that the Mastin Bank thereafter became a debtor for the money so deposited, and that the plaintiffs retained no right to the same except as creditors. Their right to a specific fund in trust is denied. I am not favorably impressed with this view of the transaction. If the credit attempted by the Mastin Bank had been perfected, I am inclined to think the position of defendant would be tenable. When Stoller & Hill drew their check for \$3,757.56 on the Mastin Bank, and delivered the same to the bank, payable to the bank, or indorsed over to it, they placed a specific fund in the hands of the bank. The bank was also advised sufficiently that Mr. Earnest was the ultimate owner or beneficiary of the fund. The bank agreed to transmit this fund to the Exchange Bank of Denver, to be received by said bank to the use of Earnest. The Mastin Bank, in good faith, believed that the same end could be accomplished by a system of credits between the two banks. Stoller & Hill's agent evidently thought so too. The Mastin Bank attempted to accomplish the same end by substituting good credit for the fund. Now, it is apparent that the plan adopted required the consent of another party, and that it could not be effective without such consent. The plan could not be accomplished by the mere act of the Mastin Bank entering a credit on its books in favor of the Exchange Bank for the use of Earnest. The Exchange Bank could not be made a debtor to Mr. Earnest without its consent, or without receiving his money. The plan adopted required a corresponding entry in the books of the Exchange Bank

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against the Mastin Bank for the use of Mr. Earnest. This corresponding entry the Exchange Bank never made. It positively declined to accept the credit tendered to it, on the faith of which it was required to pay \$3,757.56 to Mr. Earnest when he called for it. At the time it received advice of the credit tendered, the bank tendering it was insolvent, and it had good reason for declining. It could have declined without any reason or cause whatever. The fact that it did decline nullifies the plan adopted for transmission of the fund to Colorado. It also nullifies the credit entered in the Mastin Bank to the Exchange Bank for the use of Earnest. The Exchange Bank refusing the credit, there could, in truth, be none in the Mastin Bank, whatever might appear on its books. It follows, therefore, that the unaccomplished credit to the Exchange Bank left the funds in the hands of the Mastin Bank still impressed with the trust. No other appropriation of them was contemplated by the parties, and Stoller & Hill certainly consented to none other.

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II. It is claimed by defendant that while the unaccepted credit to the Exchange Bank of Colorado remained on the books of the Mastin Bank, the money upon which it was based went into the general assets of the bank, and was paid out on other liabilities of the bank. It must be apparent that the plaintiffs consented to the credit upon condition that the credit would be perfected by the consent of the Exchange Bank. Without such consent there could be no genuine credit. Having turned the fund into the general assets of the bank, without furnishing the credit upon faith of which it was received, the bank, in doing so, effected an unlawful conversion of it. The defendant claims that the plaintiffs cannot follow the fund after it was thus mingled with the other assets of the bank, so as to be distinguishable from them. The authorities cited by defendant would seem to support this position. But in the recent case of *Harrison v.*

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Smith, 83 Mo. 210, the doctrine contended for has undergone a material modification. While it may be impossible to follow the fund in its diverted uses, it is always possible to make it a charge upon the estate or assets, to the increase or benefit of which it has been appropriated. The general assets of the bank having received the benefit of the unlawful conversion, there is nothing inequitable in charging them with the amount of the converted fund, as a preferred demand.

III. The most serious embarrassment which the plaintiffs encounter in maintaining their suit, results from their previous voluntary proceedings before the assignee. It seems, from the evidence, that Mr. Earnest sued the plaintiffs in the Circuit Court of the United States in Colorado, for the proceeds of the cattle sold by them, and that while the suit was pending the parties to it entered into a written agreement, which recites the fact that the proceeds of the sale were deposited in the Mastin Bank by Stoller & Hill to the credit of the Exchange Bank of Colorado, to the use of F. P. Earnest, and provides that the party who may be defeated in the action pending, may recover the indebtedness so as aforesaid deposited with the Mastin Bank, and that the claim be presented for allowance to the assignee of the bank in the name of F. P. Earnest and Stoller & Hill, and that the dividends received thereon be collected and finally paid over to the losing party. In pursuance of this agreement the claim was presented to the assignee by the parties thereto. I infer, from the pleadings and evidence, that it was presented and allowed against the general assets in favor of the Exchange Bank to the use of Earnest. Now, this allowance was in strict conformity with the credit on the books of the Mastin Bank. The plaintiffs, after being defeated in the Colorado suit, paid Earnest in full of his demand against them. By virtue of such payment and the agreement with him, they became entitled to the claim, which they had proved up to his use. As owners thereof, the plaintiffs have received

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the sum of \$450.90, in dividends, from the general assets of the Mastin Bank. These dividends were paid to them by the assignee upon the claim as it was proved up, and the character in which they were received cannot be changed by the plaintiffs entering a voluntary credit of the same amount on their present demand. If the claim had been proven up as for a special trust fund, there might be no inconsistency between it and the present suit. But I am unable to perceive how those two demands can stand together. The claim upon which the plaintiffs have received their dividends rests upon the debt of the bank, evidenced by the credit in favor of Earnest. This debt resulted from pouring the fund into the general assets of the bank, and substituting therefor the credit of the bank.

The present suit proceeds upon the theory that the debt arising from the credit was never affected by reason of the Exchange Bank's refusal to accept it in place of money, and that consequently the fund was unlawfully converted to the use of the bank. After having resurrected the repudiated credit, and established it as a true demand against the general assets of the bank, which has been realized by plaintiffs to the extent of the assets distributable thereon, they are clearly barred from prosecuting their present claim for the specific fund. The bank is certainly not liable on both claims. Yet such would be the result if the plaintiffs were allowed to maintain their present suit. They stand in a court of equity which will look at the substance and truth of the previous proceedings before the assignee. It cannot fail to notice that the Exchange Bank had nothing to do with them, and that they were conducted at the instance of plaintiffs, who have received the proceeds thereof. They will not be permitted to occupy inconsistent and contradictory relations to the estate they are pursuing. Having received their *pro rata* share of the general assets of the bank, including the disputed deposit, upon their claim as a simple debt against the bank, they cannot be

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permitted to impeach the fact upon which they succeeded, and maintain that the bank was not a debtor for the money so deposited, but only a special trustee thereof, and that the fund delivered to it, or its equivalent, must be returned from the assets of the bank, as in case of an unlawful conversion. The allowance of their claim as a debt against the general assets of the bank ratified and confirmed the original credit for the deposit as it appeared on the books of the bank, and constitutes a negation of their present claim in equity for conversion of a specific fund. I am satisfied that this conclusion is the only one tenable on principle, and that it is in accord with the decisions of this court on analogous questions. *Valentine v. Decker*, 43 Mo. 583; *Hatcher v. Winters*, 71 Mo. 30.

Counsel for plaintiffs call attention to the case of *Bank v. Coates*, 3 McCrary, 9, in which it was held that the owner of a check, drawn by the Mastin Bank upon its correspondent in New York, might enforce it as the appropriation or assignment of the specific money called for in the check, after having presented it to the assignee and received dividends upon its allowance as a debt against the general assets. The learned judge, rendering the decision, remarks that the two remedies are not inconsistent. The point is not discussed or considered in the opinion of the court. Without stopping to consider the correctness of the ruling in that case, I have only to say that I fail to find in the opinion any satisfactory guide for the determination of this case.

In accordance with these views the judgment of the circuit court ought to be reversed, and the plaintiffs' bill dismissed. All concurring, it is so ordered.*

* Black, J., did not participate in the decision of this cause. To be filed as opinion of the court. It was approved before Commissioner Martin's office expired.

Keating v. Korfhage.

KEATING V. KORFHAGE *et al.*, Appellants.

1. **Contract: PARTY WALL: EQUITABLE EASEMENT: NOTICE.** The agreement in this case, by which the owners of adjoining lots bound themselves, their heirs and vendees in relation to a party wall between their respective lots, held (following *Sharp v. Cheatham*, ante, 498), to create an equitable charge, easement and servitude upon the lot of the defendant, and the agreement being duly executed, acknowledged and recorded affects with notice any one afterward purchasing and subjects him to the equities created by the agreement.
2. ———: ———: **ESTOPPEL.** Where a party to a contract to build a party wall, during the time he continued to be the owner of his lot, acquiesced in the construction of the wall, such acquiescence will estop him and any one claiming under him from afterward objecting to the methods whereby and materials with which such wall was constructed.
3. ———: ———. Acquiescence by the owner in a change of materials used in the construction of the wall had the effect to alter the agreement in that particular and rendered it binding upon one who received a conveyance of the lot from him without any consideration.
4. **Married Woman, Separate Property of: PRINCIPAL AND AGENT: ACTS OF HUSBAND.** A husband acting in the matter of arbitration proceedings connected with the separate estate of his wife will be regarded as her agent, and she will be considered a *femme sole* with respect to such property.
5. **Arbitration: EQUITY: PARTY WALL.** The refusal of a husband who is acting for his wife to proceed with an arbitration provided for in a contract for building a party wall and ascertaining the cost of the same, after the proceeding had been instituted and the arbitrators had failed to agree, is sufficient to authorize equitable interposition to ascertain the cost of the wall.
6. **Married Woman: JUDGMENT.** A judgment which establishes no personal liability against a married woman, but is special and against her property burdened with an equitable charge and for the enforcement of the same, is not obnoxious to the objection that it is a judgment against a married woman.

Keating v. Korfhage.

Appeal from Jackson Circuit Court.—HON. T. A. GILL,
Judge.

AFFIRMED.

The agreement in this case was as follows:

"This article of agreement made and entered into on this thirtieth day of August, 1870, by and between William J. Smith and George J. Keating, of City of Kansas, county of Jackson, in the state of Missouri, parties of the first part, and August F. Korfhage, of the City of Weston, county of Platte, and state aforesaid, party of the second part.

"Witnesseth: Whereas, said Smith & Keating are the owners of and seized of the title in fee of, in and to lot number two hundred and eighty-two [282] in block number twenty-nine [29] in the "Old Town," City of Kansas, in the county of Jackson and state of Missouri, and said Korfhage is the owner of and seized of the title in fee of, in and to the south forty [40] feet of lot two hundred and eighty-one in said block twenty-nine [29] in the "Old Town," City of Kansas, county and state aforesaid, and, whereas said Smith & Keating are about to erect a brick building on the north forty feet of said lot number 282. Now, therefore, it is mutually agreed by and between the parties aforesaid, that said Smith & Keating shall erect one-half of their north wall of their said building on the ground and land of said Korfhage on and along the south line of said south forty feet of said lot number 281, fronting on the east side of Walnut street in said City of Kansas and extending back the depth that said building of said Smith & Keating may extend. The brick wall above the surface of the earth shall be eighteen inches thick, nine inches thereof on the ground of said Korfhage and the other nine inches thereof on the ground of said Smith & Keating, and below the present surface of the earth the stone wall shall

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be of such thickness as said Smith & Keating may deem proper to construct the same, and one-half the thickness of such stone wall shall be on the land of said Korfhage, and which north wall of said building shall be and have its center on the line dividing said lots numbers 281 and 282 in said block number 29, and said Smith & Keating agree that whenever said Korfhage, his heirs or vendees may desire to build on the south twenty [20] feet of said lot number 281, that then he or they may join to, connect with and use said north wall of said building for his or their south wall of such building to the full depth and height of said Smith & Keating's said building, with the right to insert the joists and timbers therein the usual depth only, so as not to impair said wall in any manner as a fire proof division wall between two separate buildings, and the openings in said wall not to be cut any deeper than necessary to insert joists the usual depth, and said Smith & Keating are not to insert their joists and timbers in said wall a greater depth than the usual depth of joists and timbers into an eighteen inch wall, and the openings in the wall for joists shall not be deeper than necessary for the proper insertion of joists and timbers so as not to impair said wall in any manner as a fire proof division wall between two separate buildings, and said Korfhage hereby agrees and binds himself, his heirs, executors, administrators and assigns or vendees of said south twenty feet of said lot number 281 to pay to said Smith & Keating, their heirs, executors, administrators or vendees as soon as said Korfhage or his vendees or heirs may proceed with a building erection and connect with or use said wall or any part thereof for the one-half of so much of said wall as he or they may use or connect with from time to time, one-half the amount that the excavation and erection of the whole of such wall would or will then at such time cost in the City of Kansas at the usual prices, and if said

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Smith & Keating and said Korfhage, or their heirs, executors, administrators, assigns or vendees, cannot agree upon the cost of such excavations, the materials and construction of such wall, then and in that event each of the parties hereto shall select a disinterested householder of said City of Kansas as referees and such two referees thus selected shall select a third disinterested householder of said city, which three referees shall on oath estimate the then cost of the excavation, materials and construction of such wall and award one-half thereof against said Korfhage, his heirs, executors, administrators or vendees of said south twenty feet of said lot number 281 and in favor of said Smith & Keating, their heirs, executors and administrators or vendees, and said wall shall then and thereafter while it remains standing be owned by the respective owners of said several pieces of ground so adjoining as aforesaid as a partition wall between said respective premises. And it is agreed that such award so made and rendered by such referees as hereinbefore provided shall be final and binding on both the parties hereto and their representatives, and said Korfhage, his heirs, executors, administrators, assigns or vendees of said south twenty feet of said lot number 281, shall at once pay to said Smith & Keating, their heirs, executors and administrators or assigns, the full amount of such award upon the rendition of same.

"In witness whereof the said parties have hereunto subscribed their names and affixed their seals, the day and year first aforesaid.

"WILLIAM J. SMITH, [SEAL.]
"GEORGE J. KEATING, [SEAL.]
"A. F. KORFHAGE. [SEAL.]"

Milton Campbell for appellants.

(1) No cause of action is stated against Caroline Korfhage by the allegations of the petition. She is not

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alleged to have executed the contract stated, nor to have been competent to do so. "With few exceptions, the uniform current of authorities from the time of *Webb v. Russell* to the present day, requires a privity of estate to give one man a right to sue another upon a covenant where there is no privity of contract between them. And consequently that, where one who makes a covenant with another in respect to land, neither parts with nor receives any title or interest in the land at the same time with and as a part of making the covenant, it is, at least, a mere personal one, which neither binds his assignee, nor enures to the benefit of the assignee of the covenantee, so as to enable the latter to maintain an action in his own name for a breach thereof." 2 Wash. on Real Prop. [1 Ed.] 15, 16; *Todd v. Stokes*, 10 Barr, 155; *Hurd v. Curtis*, 19 Pick. 459, 464; *Gibbon v. Drew*, 10 Barr, 219; *Van Rensselaer v. Bonesteel*, 24 Barb. 365; *Webb v. Russell*, 3 T. R. [3 Durnford & East] 393; *Cole v. Hughes*, 54 N. Y. 444; *Scott v. McMillan*, 76 N. Y. 141; *Sherred v. Cisco*, 4 Sandf. 480; *Black v. Isham*, 28 Ind. 37; 16 Am. Law Reg. 8; *Patridge v. Gilbert*, 15 N. Y. 601; *Hart v. Lyon*, 90 N. Y. 663. "The obligations of all contracts are ordinarily limited to those by whom they are made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate." *Weld v. Nichols*, 17 Pick. 543; *Wiggins Ferry Co. v. Ry. Co.*, 73 Mo. 389; *Norman v. Wells*, 17 Wend. 136; *Harsha v. Reid*, 45 N. Y. 415; *Keppell v. Bailey*, 2 Myl. & K. 517; *Coffin v. Tallman*, 8 N. Y. 465; *Thompson v. Ross*, 8 Cow. 266. (2) The knowledge of Caroline Korfhage that A. F. Korfhage had assumed to bind his grantees, or attempted to impose on them a liability to fulfill his covenant did not bind her by affecting her conscience. *Keppell v. Bailey*, 2 Myl. & K. 517; 1 Smith's Leading Cases, note to *Spencer's Case*, 133, 157; *Cole v. Hughes*, 54 N. Y. 444; *Scott v. Mc-*

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Millan, 76 N. Y. 141; *Hart v. Lyon*, 90 N. Y. 663. No cause of action is stated against anybody by the facts set forth. For it is expressly alleged that the half of the wall to be built was to be awarded in favor of plaintiff and against defendant by referee and that no such award was made. This is a statement that no price is affixed to said half wall according to this contract. *Wiley v. Robert*, 31 Mo. 212; *Huff v. Shepherd*, 58 Mo. 242. A court of equity will not compel parties to arbitrate nor appoint arbitrators for them. A court of equity will not substitute itself instead of arbitrators, nor undertake to enforce a contract of purchase in which the price is not fixed in the prescribed mode. *City of St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 102. (3) No cause of action is stated because the wall plaintiff insists defendants must buy is not the wall Mr. Korfhage agreed to buy. *Kuhn v. Weil*, 73 Mo. 213; 1 Pars. on Con., Title Assent, and p. 399 [3 Ed.] (4) The evidence offered and given showing the opinions given to Smith & Keating as to the sort of foundation it was best to build was irrelevant and immaterial and should have been excluded. 2 Wash. on Real Prop. 2; 2 Story's Eq. Jur. [7 Ed.] 767. While this evidence about the concrete is an indisputable confession that the wall sued for is not the wall of the contract, it is an attempt to vary the contract, put new terms into it by parol, and estoppel. But Mrs. Korfhage, a married woman, cannot be estopped. *McBeth v. Trabue*, 69 Mo. 632; Tyler on Coverture, 726. (5) The court followed neither the petition nor the contract in its findings, and erred in computing the damages. (6) The judgment is erroneous in being a personal one against a married woman. *Caldwell v. Stephens*, 57 Mo. 589; *Wernecke v. Wood*, 58 Mo. 352; *Hunt v. Thompson*, 61 Mo. 148; *Corrigan v. Bell*, 73 Mo. 53. The cases cited by plaintiff will be found to

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be based either upon privity of estate between original covenantors, or they are based upon an explicit agreement to become bound for part of some undertaking or work on land absolutely and without contingency, and which agreement is assumed expressly or impliedly by the grantee.

P. S. Brown for respondent.

(1) The legal effect of the agreement was to create cross-easements in the respective owners of the adjacent lots with which the covenants in the agreement will run so as to bind all persons succeeding to the estates to which such easements are appurtenant. *Roche v. Ullman*, 104 Ill. 1; *Keteltas v. Penfield*, 4 E. D. Smith, 122; Warvelle on Abstracts, sec. 9, p. 310; *Trustees v. Lynch*, 70 N. Y. 441. (2) A covenant runs with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. *Savage v. Mason*, 3 Cush. 505. (3) This was a grant—an easement. It was an incorporeal hereditament, and the covenant connected with it bound and was a charge upon the land. *Keteltas v. Penfield*, 4 E. D. Smith, 122; *Weyman's Exrs. v. Ringold*, 1 Bradf. [N. Y.] 55. (4) That this covenant runs with the land and binds Mrs. Korfhage seems to be well settled by the following "party wall" cases: *Roche v. Ullman*, 104 Ill. 1; *Richardson v. Foley*, 121 Mass. 457; *Weyman's Executors v. Ringold*, 1 Bradf. 52; *Platt v. Eggleston*, 20 Ohio St. 414; *Savage v. Mason*, 3 Cush. 500; *Standish v. Lawrence*, 111 Mass. 111; *Maine v. Cumston*, 98 Mass. 317; *Keteltas v. Penfield*, 4 E. D. Smith, 122; *Burlock v. Peck*, 2 Duer, 90; *Wickersham v. Orr*, 9 Iowa, 253; *Thompson v. Curtis*, 28 Iowa, 229; *Brown v. Pentz*, 1 Abb. [Ct. App.] 227; *Rawson v. Bell*, 46 Ga. 19. (5) When Mr. Korfhage parted with his title his liability ceased and attached to his vendee. *Standish v. Lawrence*, 111 Mass. 111. (6) Mrs. Korfhage took the

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property with all the benefits and burdens belonging to it at the time she received her conveyance. *Henry v. Koch*, 80 Ky. 395. (7) Under the agreement the liability is a lien upon the land and will be enforced in equity against the grantee. *Campbell v. Mesier*, 6 Johns. Ch. 21; *Roche v. Ullman*, 104 Ill. 1; *Trustees v. Lynch*, 70 N. Y. 450. (8) Equity has jurisdiction to enforce against grantees, with notice, mutual covenants made between owners of adjoining lands, regulating the use and enjoyment of their respective properties. *Trustees v. Lynch*, 70 N. Y. 440; *Barrow v. Richards*, 8 Paige, 351; *Norfleets v. Cromwell*, 70 N. C. 641; *Parker v. Nightingale*, 6 Allen, 315; *Whitney v. Union Railway*, 11 Gray, 359; *Hills v. Miller*, 3 Paige, 254. (9) A court of equity will take an account of the value of a party wall and grant the proper relief where defendant refuses to carry out the provisions of the agreement. *Biddle v. Ramsey*, 52 Mo. 153; *Hug's Adm'r v. Van Burkley*, 58 Mo. 202; *Masson's Appeal*, 70 Pa. St. 26; *Rindge v. Baker*, 57 N. Y. 219; *Arnot v. Alexander*, 44 Mo. 25; *Black v. Rogers*, 75 Mo. 441. (10) Where the proof shows a substantial compliance with the purpose of the agreement a recovery may be had upon it. *Rice v. Railroad Co.*, 63 Mo. 314; *Woodward v. Fuller*, 80 N. Y. 312; *Nolan v. Whitney*, 83 N. Y. 648. (11) The evidence shows that Mr. Korfhage saw the wall built, made no objection and expressed himself satisfied with it and it does not lie in his mouth or that of his grantee without consideration, ten years thereafter to assert the contrary. *Swain v. Seamans*, 9 Wall. 254; *Hexter v. Knox*, 39 N. Y. Sup. Ct. 109; *Day v. Catron*, 119 Mass. 513. (12) Mrs. Korfhage, not being a purchaser for value, is affected by all the equities that her husband would be if he were still vested with the title. (13) The judgment establishes no personal liability against Mrs. Korfhage. *Hoskinson v. Adkins*, 77 Mo. 573.

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SHERWOOD, J.—I. Under the authority of the case of *Sharp v. Cheatham*, ante, 498, the agreement made between Smith & Keating, and August F. Korfhage whereby they bound themselves, their heirs and vendees in relation to a party wall between their respective lots 282 and 281, in block 29, "Old Town," Kansas City, must be regarded as binding and creating an equitable charge, easement and servitude on the lot 281 then owned by August F. Korfhage. And this agreement having been duly executed, acknowledged and put to record and Smith & Keating having built on their lot, any one purchasing afterward from August F. Korfhage would take with notice and subject to the equities created by such agreement. And Keating having bought Smith's interest in the agreement and in lot 281, and received a deed therefor, would be the successor to whatever rights and equities Smith possessed in the premises. The claim of defendants that the agreement should be held invalid or the mere personal one of August F. Korfhage, incapable of being enforced in equity, must, on the authority of the case cited, be ruled adversely to such claim.

II. As to the character of the party wall built by Smith & Keating, as to whether it complied with the agreement, it suffices to say that there was evidence which showed to the satisfaction of the trial court that August F. Korfhage, while he continued owner of lot 281, acquiesced in the construction of the party wall, and such acquiescence estopped him and any one claiming under him from now objecting to the method or materials whereby and wherewith such wall was constructed; and this acquiescence on his part in a change in the materials used for constructing the stone foundation of the wall, had the effect to alter the agreement in that particular and to render the agreement, as thus changed, binding on the defendant, Caroline Korfhage, who, hav-

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ing received a conveyance of the lot without any consideration, stood in the shoes of her husband.

III. Mrs. Korfhage, having a separate estate in the lot in question and there being sufficient evidence to satisfy the trial court that her husband acted as her agent in the matters connected with the arbitration proceedings, she must be regarded respecting her separate property as a *femme sole* and his acts as her acts.

IV. As there was evidence which satisfied the trial court that August F. Korfhage when acting as the agent of his wife refused to go on with the arbitration proceedings after they had been instituted and the arbitrators had failed to agree, this was sufficient to authorize equitable interposition to ascertain the cost of the wall. Indeed, under the ruling in *Black v. Rogers*, 75 Mo. 441, the agreement made between the original parties and the completion of the party wall was the principal thing; the computation of the cost of that wall was merely auxiliary thereto and inasmuch, owing to the completion of the party wall, as the parties could not be restored to their *statu quo*, it was competent for a court of equity by any appropriate procedure to ascertain such cost and otherwise adjust and enforce the equities of the case.

V. The judgment in this cause is not obnoxious to the objection that it is a judgment against a married woman. The judgment establishes no personal liability against Mrs. Korfhage. It is special and against the property burdened with the equitable charge, and for the enforcement thereof. *Hoskinson v. Adkins*, 77 Mo. 573.

Finding no error in the record, judgment affirmed.
All concur.

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KELLY, Appellant, v. THE CHICAGO & ALTON RAILROAD COMPANY.

1. **Railroads: TRAVELLER WITH TEAM: CROSSING TRACK.** A traveller, with a team, crossing a railroad where it intersects a highway, is not required to stop absolutely and always, or to fasten his team and go forward on foot to a point where he can look up and down the track.
2. ——— : ——— : ——— : **DUTY TO STOP AND LISTEN.** Where such traveller, however, is about to cross a railroad track on a public street crossing and at hours when trains are passing, he should, if he cannot see the track, listen, and if necessary for that purpose, on account of the noise made by the wagon, he should stop and then listen for the train before blindly venturing on the track.
3. ——— : **FAILURE TO RING BELL AT CROSSING: EVIDENCE.** In an action against a railroad for injuries to plaintiff's team by one of its trains by reason of the failure to ring the bell of the locomotive within eighty rods of the crossing, evidence to show connection between such failure to ring the bell and the injury to the team is irrelevant and unnecessary.
4. **Evidence: DECLARATIONS OF AGENT.** In such action, a conversation had between a brakeman of the train and plaintiff's driver after the occurrence of the accident and the stopping of the train, in which the driver stated that he was not looking, or listening, or thinking about the train, held inadmissible, following *Adams v. Ry.*, 74 Mo. 553.

Appeal from Jackson Circuit Court.—HON. F. M. BLACK, Judge.

AFFIRMED.

Wash Adams for appellant.

(1) The court erred in permitting the witness, Melver, on behalf of respondent, to testify to a conversation occurring between him and appellant's driver after the injury had happened. It was not a part of the *res gestæ*

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and was incompetent. *Adams v. Ry.*, 74 Mo. 553; *McDermott v. Ry.*, 73 Mo. 516. (2) The court committed error in refusing to give the first and third instructions asked by appellant. *Harlan v. Ry.*, 65 Mo. 25; *Meyers v. Ry.*, 59 Mo. 223; *Kelly v. Ry.*, 75 Mo. 138; *Singert v. Ry.*, 14 Rep. 405. (3) The court erred in giving defendant's instruction which told the jury that "if plaintiff's servant in charge of the wagon and team might have seen or heard defendant's approaching train and failed to do so by his own want of care and attention, plaintiff could not recover." Plaintiff's driver was only required to exercise that degree of care which men of ordinary prudence and caution are accustomed to exercise under similar circumstances. *Kennedy v. Ry.*, 36 Mo. 351; *Ry. v. Moore*, 24 N. J. L. 824; *Imp. Co. v. Stead*, 95 U. S. 161; *Ry. v. Crawford*, 24 Ohio St. 639; *Ry. v. Stout*, 53 Ind. 143; *Ry. v. Smith*, 16 Rep. 345; Wharton's Law of Negligence, sec. 48. The instruction was misleading and otherwise objectionable. (4) The instruction given by the court of its own motion was likewise erroneous. It was equivalent to saying, plaintiff could not recover unless the driver stopped the team before venturing to cross the railroad track. The duty of stopping, absolutely, should not be crystalized into a "procrustean rule." *Kennedy v. Ry.*, 36 Mo. 363; *Plummer v. Ry.*, 14 Rep. 363; *Ry. v. Graves*, 69 Texas, 339; *Nehrbos v. Ry.*, 62 Cal. 320; *Kelly v. Ry.*, 29 Minn. 1; *Davis v. Ry.*, 47 N. Y. 402; *Kellogg v. Ry.*, 79 N. Y. 76; *Duffy v. Ry.*, 32 Wis. 274; *Eilert v. Ry.*, 48 Wis. 608; *Bunting v. Ry.*, 14 Nev. 358.

Lathrop & Smith for respondent.

(1) The demurrer to evidence should have been sustained, and the judgment being for the right party, this court will not reverse, even if it should be of opinion that errors were committed in the admission or exclusion of evidence, or the giving or refusing of instructions.

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Harlan v. Ry., 64 Mo. 480; *Fletcher v. Ry.*, 64 Mo. 484; Whar. on Neg., sec. 384; Shear. & Redf. on Neg., secs. 488, 488 a; *Gorton v. Ry.*, 45 N. Y. 662; *Zimmerman v. Ry.*, 71 Mo. 476; *Henze v. Ry.*, 71 Mo. 636; *Purl v. Ry.*, 72 Mo. 168; *Turner v. Ry.*, 74 Mo. 602; *Powell v. Ry.*, 76 Mo. 80; *Lenix v. Ry.*, 76 Mo. 84. (2) Defendant's evidence showed that its servants used every means in their power to prevent the injury after they became aware of the danger in which plaintiff's property had been placed. Hence, plaintiff had no right to recover upon that theory, and defendant's right to have its demurrer to evidence sustained was not affected. *Harlan v. Ry.*, 65 Mo. 22; *Moody v. Ry.*, 68 Mo. 470; *Purl v. Ry.*, *supra*. (3) The questions asked by plaintiff's counsel, and excluded by the court, were all improper. They simply called for the opinions of the witnesses. The office of witnesses is to detail facts; that of the jury to draw conclusions from those facts. (4) The conversation between plaintiff's driver and the brakeman happening as it did almost at the very time of the accident and in full view of the damaged property, was competent as part of the *res gestae*. *Brownell v. Ry.*, 47 Mo. 239; *Mosley v. Ins. Co.*, 8 Wall. 397; *Ry. v. Coyle*, 55 Pa. St. 402. (5) Mann, the fireman, testified that he called Mead's, the engineer's, attention to the fact that he was ringing the bell. Mead was permitted to testify that he remembered Mann's calling his attention to that fact. In this there was no error. The matter testified to by Mead was a "verbal fact," and not hearsay. (6) Plaintiff's refused instructions were all properly refused. The first left to the jury to determine whether plaintiff's driver was exercising the ordinary care of a prudent man, without having the court instruct them as to what care a prudent man was obliged to take. *Zimmerman v. Ry.*, *supra*. The second instruction was an indirect attempt to have the court comment on the weight to be given to the evidence and was not justified by the conduct of any

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of the witnesses on the stand or their manner of testifying. The third instruction was properly refused, because it was not in the form required by the decisions of the Supreme Court, and because there was absolutely no evidence to support it. *Harlan v. Ry., supra.* (7) The instructions given for defendant and that given by the court of its own motion were in exact accordance with the law as the cases already cited conclusively show.

RAY, J.—This action was brought by plaintiff to recover damages for killing a horse and injuring a mule and harness and wagon by defendant's cars at the crossing of Lydia avenue, over the railroad of defendant, in Kansas City, Missouri. The negligence charged in the petition was a failure to ring the bell within eighty rods of the crossing, and running the train at a speed in excess of six miles per hour, contrary to the city ordinance. The answer was a general denial and a plea of contributory negligence.

Evidence offered by plaintiff for the alleged purpose of showing the connection between the failure to ring the bell, and the injury to the wagon and team, and opinions of the witnesses in that behalf were excluded by the court. The court also permitted defendant's brakeman to testify over plaintiff's objection to a conversation which he had with the driver of the plaintiff after the accident had happened and the train stopped, to the effect that he was not looking, noticing or thinking about the train. At the close of the plaintiff's evidence the court refused a demurrer thereto. Under the instructions given and the evidence in the cause the jury found a verdict for defendant, on which judgment was entered, and plaintiff has appealed therefrom to this court.

We will first give some of the facts which we understand to be undisputed, and others as to which there is a conflict, more or less marked, in the evidence.

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Lydia avenue, where the collision occurred, crosses a number of railroad tracks, including the main tracks of the defendant, and the Narrow Gauge Railroad, and several other switch tracks leading to the elevator. About eighty feet east of the crossing, defendant's side track (number one) connected with its main track, and some fifty feet still further east on this side track was the limit post, which marked the extreme point on the side track towards its western connection with the main track beyond which cars could not be placed without interfering with the passage of trains on the main track. On this side track and beyond the limit post thereon were, as is conceded, some box cars, the evidence being somewhat conflicting as to their number, and how far, if at all, they operated to obstruct the view of the driver as he approached the main track. Much of plaintiff's evidence as well as the entire evidence of the defendant in that behalf is to the effect that at a distance from the main track, variously estimated at from four or five to twenty-five or thirty feet, the driver in approaching would be able to see up the track to the east a distance variously estimated by the witnesses at from one or two hundred feet to a half or three-fourths of a mile. The map in evidence in the cause is, we believe, not questioned as to its general correctness, and an inspection of the same indicates, we think, that at a point somewhere between these distances thus estimated, a view could be had for some distance beyond said limit post at least. There is, however, evidence on the part of plaintiff that the box cars would not cease to be an obstruction to the view of the track in that direction until the driver arrived at or very close to the main track.

There is a marked conflict in the evidence as to whether the bell was ringing or not, but it is undisputed and conceded that the speed of the train at the time was in excess of six miles per hour, which was the maximum allowed in the city limits by the city ordinance, the esti-

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mate thereof by the witnesses ranging from ten or twelve to twenty or twenty-five miles per hour. It is conceded that the collision occurred about nine o'clock in the morning, the day being clear, and that the damage was done by one of defendant's regular passenger trains then due and arriving from the east.

It is also conceded that after passing the first track some one hundred and sixty or one hundred and eighty feet from main track, driver did not stop the team before entering upon the main track and that he did not see the train until the engine struck or was about to strike the team. The evidence also varies somewhat as to whether the team was struck by the pilot, or cow catcher, commonly so called, or some portion of the side of the engine. There is evidence to show that if the driver had stopped and listened he could have heard the train a good distance off, which indeed is, we think, an obvious and necessary inference, where there is no evidence that the wind is blowing so as to interfere, and nothing otherwise appears in the circumstances and locality to obstruct the sound. It is also undisputed that plaintiff's driver and his team were familiar with the crossing, having passed it several times every day for some time in hauling rock, and that he frequently on other occasions stopped the team at and between the various tracks to see if trains were coming, and to allow them to pass, as was also generally and often done by others as occasion required. Having proceeded thus far in the statement of the general facts and features of the case as shown by the evidence, we deem it important and necessary to give a summary of what the witnesses say as to the conduct of the driver as he approached the track, and at the time of the collision and injury to the wagon and team. This involves, we are aware, some repetition and prolixity, perhaps, but this is unavoidable.

As bearing upon this question, we quote from the

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witnesses of the occurrence, introduced by plaintiff, portions of their evidence as follows :

Oliver Coleman, plaintiff's driver, testified :

"I was driving a load of rock on Lydia avenue, and drove up to the crossing to come across. I stopped for the switch engine to go across. Lydia avenue is a pretty rough street, considerably travelled. I was going north towards the river. * * * The cars on this switch obstructed my view of the train coming in at that time, and I heard no bell ringing. I was looking ahead when I came along there. I looked up and down the track to see if a train was on the track and couldn't see no train. The box cars in front of me prevented me from seeing any."

On cross examination Coleman testified :

* * * "I had a rock wagon with no bed on. I was sitting in front on the right hand side, going north. There was a man on the wagon with me. He was on the back end of the wagon. We were not talking. I had a heavy load of rock and was headed right towards the river, but the wagon did not make very much noise. The road is rather rocky and rough and I would have to watch out pretty well. A train on the Narrow Gauge road from Kansas City passed along and I was watching that train, and as soon as the last car got beyond the street I drove right on the Chicago & Alton track. The horse got his front feet over on the first rail when he was struck. It was the beam that struck him as well as I can remember."

Q. "Now you say five or ten feet before you got to the track, you could see down the track for a half mile about?"

A. "Five or ten feet I could see."

Q. "By the time you got up within fifteen feet you could see half a mile?"

A. "Yes sir."

Q. "You say the moment the fore feet of the horse

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got over the track the engine struck them; when your horse got up to the track the engine couldn't have been over one hundred and fifty feet from you?"

A. "I couldn't know. I didn't see until it struck."

Q. "But from a point twenty or twenty-five feet you could see up the track for a half a mile?"

A. "I could see, but I didn't see."

Pepperd, who was a letter carrier, on his duty in that behalf, in that part of the city, was asked, if in the position the driver was he could see the train coming in, and answered, if it had not been for the cars on the side track he could have seen out without any trouble. On cross-examination, he said that when he first saw the driver he was about twenty-five or thirty feet from the main track. Another man sat behind him, but he was not close enough to tell whether they were talking. The driver was facing to the northwest and that he did not notice him change his position; that at the distance of ten or fifteen feet from the main track he could have seen it some distance, and that he thought the driver was noticing the Narrow Gauge train more than anything else.

Sullivan, who was at the west cut on Lydia avenue, testified in part as follows:

Q. "Do you recollect how he was sitting on the wagon?"

A. "Toward the Chicago & Alton track as it came from the east."

Q. "Watching the team?"

A. "I see him have the lines in his hands and looking straight ahead of him."

Q. "Did he change his position after crossing the switch until he got on the main track?"

A. "I didn't see him change."

* * * * *

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Q. "You say they drove on until the horse and mule just stepped onto the track?"

A. "Yes."

Q. "About how far could he see?"

A. "I don't know."

Q. "Could he see one hundred and fifty yards?"

A. "I don't think he could see over a hundred yards."

Q. "Up toward the clearance post a man driving along Lydia avenue at a distance of fifteen or twenty feet from the main line of the Chicago & Alton track, could he see about one hundred yards?"

A. "Just about."

On re-examination, the witness thought the cars would not cease to be an obstruction to the view until the driver was very close to the main track. There is little circumstantial variety in the statements of the other witnesses of the transaction introduced by the plaintiff. Mrs. Sullivan, who was on the hill above the elevator, and Mr. Wood, who was north of all the tracks and on the side next the river, testified that they saw the men on the wagon, that they were not close enough to tell whether they were talking with each other, that as soon as the Narrow Gauge train passed, the driver of the team drove onto the main track of defendant without stopping, that he was seated on the front end of the wagon with the lines in his hands, that he was looking straight-ahead, or looking north, and that they did not notice him change his position.

The defendant introduced a number of witnesses who saw the transaction, and among them Mrs. Sells, who came from McEvoy's grocery store beyond and north of the tracks, and saw defendant's train coming in, and also saw the wagon and team coming towards the track. She says the colored men were laughing and talking and not looking out for the cars; that when she got to the Narrow Gauge track she motioned to them and "hol-

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lered" as loud as she could to stop, but that she didn't think the driver heard her, as he did not look up, and that he could have stopped easy after she halloood, and saved the team.

The witness, Cameron, designated where he was by pointing out on the map, and we are, therefore, not able to give his exact position. But he was somewhere between the frog, which is about eighty feet east of the crossing, and the elevator, and was going west towards the wagon. The men were on the front of the wagon facing towards the horse and their backs toward him and partly towards the train as it was coming. He heard the cars coming. He thought they would stop. They seemed to be very busy talking, and he stood and watched them. They drove right up to the track. The cars had then got pretty near on them and he then halloood three or four times. He says he heard Mrs. Sells halloo to them, but don't think they heard either of them, and that they neither of them changed their positions. That after shouting at them to stop he ran a few steps towards them and the team was then struck, as he thought, by some part of the side of the engine.

Mr. Porrd, also employed at the elevator, testified he was about four hundred feet from Lydia avenue crossing, and his attention was attracted by hearing Cameron calling to the men; that he heard the train coming in, and saw the team which was close, and he judged only four or five feet from the track, and that the train was then very near. He described the driver as sitting on the west side of the wagon between the front and rear wheels with feet projecting over. That his back was towards him and the train, and his face turned northward and towards the city, that he never stopped, and that the team was struck by some portion of the side of the engine. •

So far as the men in charge of the train are concerned, the evidence shows that the engineer was seated

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on the right hand side of the engine going west and on the northerly or river side, that the team as it came upon the south side did not get far enough upon the track for him to see it. That the fireman hallooed when they were very close, he supposed, some fifteen or twenty feet, and that he then applied the air brakes with full force, but did not have time to reverse the engine, and that it was impossible to stop. The fireman testified that when he first saw him he was some distance down the street, that when he next observed him he was far enough away to stop, and he thought he was going to as other teams did. That the next moment the team stepped on the track and he hallooed "whoa." That after he drove onto the track he thought he was asleep or going to sleep.

The brakeman, McIres, testified that he was on the platform leaning out and that he saw the man just as he drove up to the track, that he didn't think the team got on the track but were struck by the cross-bar or cylinder; and when he first saw him the engine was about thirty feet distant. This is a statement somewhat extended of the testimony in the case in this behalf, the effect of which we will now proceed to consider.

There is little if anything in the evidence of Mr. or Mrs. Sullivan, or Wood, that Coleman, as he drove towards the track in his wagon loaded with rock, was either looking or listening for the train. When they saw him he was driving along with the lines in his hand, and looking ahead, looking north and towards the river, and they all say they did not see him change his position. In this position, as thus described by them, he could not well see the train until it was well in front or near the crossing. Pepperd, who was the letter carrier, described his attitude and appearance much the same way, except that he says the driver's face was towards the northwest, in which position his back would be partly turned towards the train as it was coming, and he fur-

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ther states that he thought he was paying more attention to the Narrow Gauge train than to anything else. None of these witnesses were close enough to say whether he was talking with the other man on the wagon with him, so that about all the evidence in the case that he was not carrying on a conversation with this colored man, Shaw, and that he was looking and listening for the train as he approached the track, is in what the driver himself says in these behalves. It is his evidence, if any, that makes any conflict upon this issue of contributory negligence which, we think, is the vital question in this case.

His statements in this behalf are, we think, inconsistent, and perhaps irreconcilable with other direct and unequivocal statements made on cross-examination. Among other things, he was asked upon cross-examination if at a point twenty-five or thirty feet from the main track he could not see up the track for a half mile, and he answered, "I could see, but I didn't see." But waiving this and other variances in his testimony, and conceding these were matters going to his credibility, and were for the jury, the question is whether as a matter of law we are not bound to deny a right of recovery to the plaintiff in this case. The driver, Coleman, testifies that as he came along between the tracks he looked up and down the track to see if a train was coming and could see no train. But he also testifies that he could not see out; that the box cars on the side track prevented him from seeing. When he thus says in such connection, that he looked up and down the track, he manifestly means, we think, that he looked in the direction he knew or supposed the track to run in that locality, for if he could not see the train on account of such obstruction he could not see the track for the same reason. The question then is, what did the law require of him in that behalf under such circumstances.

Manifestly, it then devolves on him the duty of lis-

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tening, and upon this question, whether or not the driver in fact listened in this case for the train, we find no declaration in his evidence anywhere in which he expressly so states. He was asked, it is true, several times if he heard any bell, and he says he did not, and that the bell was not ringing, but he was not asked, so far as we have been able to see, whether he heard the train, and he does not say whether he did or not. If he does so state it has escaped our observation after a very careful reading of his entire evidence in the record. But conceding that as he looked, heard no bell, and states that none was ringing, we may infer that he listened, as he drove along, for the train, the further question arises as to what, if anything, in view of his mode of travelling and his surroundings at the time the law required of him before venturing upon the track thus obstructed to his view. In devolving the duty of listening upon him where he cannot sufficiently see the track, the law supposes that he is in a position to listen and that the circumstances are such as to make this means ordinarily adequate for his safety available. If his wagon or other mode of conveyance and other facts and circumstances are such as materially interfere with and obstruct his hearing, he manifestly cannot perform this duty so long as these difficulties exist. Where these obstructions to his sight and hearing are obvious and known to him, and in part at least under his control at the time, he is, we think, bound to act in reference to this state of facts, and to put himself in a proper situation in which he might reasonably be able and likely to see or hear an approaching train. It is of but little moment to say in such case that he looked, when as he testifies he could not see, or that he listened, if it was obvious that his hearing would thus be interfered with and obstructed. As he approached he had observed and was paying attention to a train on the Narrow Gauge track, then going east, from which direction the train in question was

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coming at the time. He was driving along the road on his wagon which was loaded with rock, and we think it is obvious and must have been reasonably well known to him, that these noises would materially interfere and deprive him of any fair opportunity to hear the train.

It is, we think, somewhat remarkable that this driver and man with him on the wagon should have been the only ones in that locality at the time, who did not either see or hear the train until it was in the act of striking the team. They were the only ones desiring and intending to cross the track at that time, and the only ones whose safety was involved and who, we would naturally suppose, would, therefore, be the most vigilant and observant, and most likely to see and hear a train on the track they were thus intending to cross. They not only failed to either see or hear the train, but they also failed to observe the motions or hear the calls to stop made by the witness, Mrs. Sells. She was north of the track directly in front of them and called to them from the Narrow Gauge track which is only eighteen or twenty feet north of the main track of the defendant, and they were at a distance from the main track which she estimates less than the width or length of the court room. They also failed to hear the witness, Cameron, when he called to them several times to stop. His shouts attracted the attention of the witness, Porrd, who seems to have been about as far off as the driver and team, and Cameron testified that he heard Mrs. Sells, who was on the opposite side of the team and tracks, so that these men on the wagon, though called on from both sides by these parties, nevertheless failed to hear either of them. Other witnesses for plaintiff say, as he does, that they did not hear the bell, and that it was not rung, but they all heard the train and what else was there to prevent his doing so, if he was listening therefor, unless it was the noise of his wagon whilst going along? We do not understand the law to be, nor do we so hold, that

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it is the duty of the traveller, where the highway crosses the railroad track, absolutely and always to stop, or to fasten his team and go forward on foot to a point where he can look up and down the track, but as applied and limited to the facts of this case at such crossings and at such hours when trains are passing and liable to pass at any time, as was well known to said Coleman, we think it does require of him, where he cannot see the track, to listen, and, if necessary for that purpose, on account of the noise made by his wagon, to stop and listen for the train before venturing blindly upon it. This does not, we think, exact or require any unreasonable or extraordinary prudence or precaution on the part of the traveller, but is only such prudence as a reasonable man would take for the protection of his own person and property under such circumstances. Such is, we think, the doctrine and rule declared by this court heretofore in a number of cases. *Purl v. Railroad*, 72 Mo. 168; *Henze v. Railroad Co.*, 71 Mo. 636; *Harlan v. Railroad*, 64 Mo. 480; *Fletcher v. Railroad*, 64 Mo. 484.

The evidence offered to show the connection between the failure to ring the bell and the injury to the wagon and team was properly excluded for the reason that under our later decisions upon this question, such evidence in this class of cases is irrelevant and unnecessary. 82 Mo. 196; 81 Mo. 521; 78 Mo. 578; 76 Mo. 494 and 498; 83 Mo. 386.

The evidence admitted as to the conversation between the brakeman and plaintiff's driver was, we think, incompetent under the principle and rule declared by this court in the case of *Adams v. Railroad*, 74 Mo. 553. But notwithstanding this was error, as we are of opinion that upon all the evidence offered exclusive of the objectionable evidence, the plaintiff was not as a matter of law, entitled to recover, the judgment was, we think, for the right party and ought not to be disturbed.

For these reasons the judgment of the circuit court

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is affirmed, in which all concur, except Sherwood, J., who concurs in the result. Black, J., is of opinion that the conversation between the brakeman and plaintiff's driver was competent and admissible as a part of the *res gestae*, otherwise he concurs fully in the opinion.

SHERWOOD, J.—In view of the foregoing opinion may I be permitted to inquire what has become of the rule announced in *Petty's case*, *ante*, p. 306?

HEMAN, *Receiver, Appellant*, v. BRITTON *et al.*

1. **CORPORATIONS: INSURANCE: BONDS OF COMPANY: CONTRACT.** Bonds, forming a part of the assets of a life insurance company which is closing up its business and effecting a re-insurance, which are assigned for the protection of sureties upon an indemnifying bond, given by the company re-insuring to that with which it re-insures, under a contract that after the liability of the sureties is at an end, such bonds shall be apportioned among the stockholders of the company re-insuring, the bonds, on such apportionment, become the property of the stockholders against all the world, except the creditors of the company.
2. ———: ———: **TRUST: EQUITABLE LIEN.** But the assets of the company so received by its stockholders, constitute a trust fund for the payment of the debts of the company, and an equitable lien exists against them in favor of the creditors which may be enforced, as the directors and stockholders of the company re-insuring, and not the creditors, must answer for the failure of the company with which it re-insures to comply with its contract.
3. ———: ———: **RECEIVER: COSTS AND DEBTS.** A receiver of the re-insuring company, appointed upon its being declared insolvent, is entitled to resort to the said bonds so distributed among the stockholders, only so far as necessary to pay the debts and reasonable costs of the receivership, and he is to be charged with all moneys and property in his hands and credited for the allowed demands in favor of creditors paid and to be paid, and reasonable costs of the receivership.

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Appeal from St. Louis Court of Appeals.

REVERSED.

Dryden & Dryden and B. H. Dye for appellant.

(1) The referee's findings both of law and fact were right. The exceptions to his report should have been overruled. The corporate power of the company under the law in force at the time it was incorporated was in the directors only. G. S. 1865, p. 355, sec. 7; p. 360, sec. 36. And by that law the special power of distributing the assets of the company, was also bestowed upon it. G. S. 1865, p. 364, sec. 51. The corporate power being vested by law in the directors, could not be exercised by the stockholders, even if all were present and assenting. Green's Brice's *Ultra Vires* [Am. Ed.] pp. 390, 394, and notes. But in fact there was no meeting of the stockholders, and no attempt at any corporate action by them as such. (2) If the referee had even found that the respondents held the bonds in trust for the stockholders, still, under the evidence, the plaintiff would have been entitled to a decree subjecting so much of the bonds, or their proceeds, as might have been needed, to the payment of the debts of the company, the costs of the dissolution proceedings, the receivership and the litigation incident thereto. That the assets or capital of a corporation are a trust fund for its creditors which cannot be given away, or distributed to its stockholders, without being subject to be followed by creditors, and applied to the payment of debts, is a doctrine now too well established to need citation of authority. *Wood v. Dummer*, 3 Mason, 308; *Thompson on Stockholders*, sec. 10; *Gill v. Balis*, 72 Mo. 424; *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Trebilcock*, 1 Otto, 45. (3) It was error for the court, after sustaining respondents' exceptions to the referee's report, to enter a judg-

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ment as upon the report. It should have re-committed the case to the same, or some other referee, for a new trial. The report of a referee stands in the place of the verdict of a jury, and, if confirmed, is made the basis of a judgment, with like effect as a special verdict. R. S. 1879, sec. 3623. In a case where all the exceptions are sustained, and they, in their nature, go to defeat all of the findings, surely there is nothing left upon which to base a judgment, and the only logical result would seem to be, that which the statute seems to prescribe in such a case, namely, a reference again for a new trial and a new report. R. S. 1879, p. 618, sec. 3623. Nor is this adverse to those decisions of our Supreme Court which hold that after a court has set aside the report of a referee it may proceed, taking the evidence returned by him, to make for itself a new and distinct finding of facts and law. *O'Neil v. Capelle*, 62 Mo. 208; *Moniteau Nat'l Bk. v. Miller*, 73 Mo. 192.

Alexander Martin also for appellant.

The receiver represents the creditors. He could not be an efficient representative of them if he was concluded by every act that concludes the company. He can recover assets which the company would be estopped from recovering. In looking at the substance of things, equity will sometimes clothe intentional efforts with the raiment of accomplished facts. This is done in furtherance of justice between contracting parties. But it will not do this if the effect of it is to destroy a right or lien in a third party, which is superior to the rights of both the contracting parties, as in this case. Justice would not be advanced by such a construction of the dealings between the company and its stockholders. *Alexander v. Relfe*, 74 Mo. 495; *Huyes v. Kenyon*, 7 R. I. 136. It is settled in this state that the assets of a corporation constitute a trust fund for the benefit of its creditors.

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An equitable lien exists in their favor which equity will protect and maintain in all proper proceedings for their benefit. This lien outranks the lien of the stockholders. Their shares belong to them subject always to the payment of all debts and obligations incurred by the company. When the assets of a company have been distributed in violation of the lien of creditors, equity will interfere to restore them to their subject condition. *Bartlett v. Drew*, 57 N. Y. 587; *Hastings v. Drew*, 76 N. Y. 9; *Rieds v. Eatonton Man'f'g Co.*, 40 Ga. 104; *Sawyer v. Hoag*, 17 Wall. 610. *A fortiori* will it interfere as in this case to protect and maintain the lien of creditors before actual distribution.

Overall & Judson for respondents.

A corporation may distribute its assets among its stockholders after providing for the payment of its debts. Morawetz on Private Corporations, sec. 573.

BLACK, J.—The plaintiff was appointed receiver of the DeSoto Mutual Life Insurance Company in 1878 in a suit instituted by the superintendent of insurance, and by which suit the company was adjudged to be insolvent. By this suit the plaintiff seeks to require the defendants to account for and turn over to him eleven bonds of the denomination of one thousand dollars each, and the interest thereon. The defendants received the bonds under the following circumstances:

The DeSoto Insurance Company ceased to do business, that is, to take new policies, in 1871, and then re-insured with the Republic Insurance Company of Chicago. That company became insolvent and the DeSoto was required to take care of its outstanding policies, of which there were only fifty-four in number. To that end the DeSoto, in 1874, made a contract with the Mound City Insurance Company, which in substance is as

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follows : The Mound City agreed to assume and pay all losses then existing or that might thereafter accrue upon the fifty-four policies, to pay all other liabilities of the DeSoto, there then being some other contested demands ; and to cause to be released and turned over to Lionberger, Ballantine and Britton, in trust for the stockholders of the DeSoto, one hundred thousand dollars of bonds and other securities, which the DeSoto then had on deposit with the state insurance department, by the substitution of other securities therefor. In consideration of all this the DeSoto agreed to pay \$20,019, and also to give the Mound City a bond in the sum of ten thousand dollars, with Ballantine and these defendants, Lionberger, Tutt, Johnson and Burr, as securities, conditioned to indemnify the Mound City against all demands against the DeSoto, except those arising upon said fifty-four policies. The DeSoto also agreed to cause all of its stock to be assigned to such person or persons as the Mound City might designate, the assignee, however, not to participate in the division of the securities and assets to be delivered to Lionberger, Ballantine and Britton, in trust for the stockholders as before stated.

After this executory agreement had been signed by both of the companies and the indemnity bond executed, the board of directors of the DeSoto passed a resolution appointing Lionberger, Ballantine and Britton trustees to carry out the provisions of the contract, with authority "to receive the securities and assets of this company, and distribute the same among the individual stockholders of this company as their interests then may be shown by certificates of stock." On the same day and at the same meeting, the board made another order, or resolution, reciting the indemnity bond, and to save the said securities thereon from loss, ordered that eleven of the bonds of one thousand dollars each, "now the assets of the company," be deposited with a designated depos-

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itory, subject to the joint order of the securities, with power to sell the same and pay any lawful demands that might be made upon the indemnity bond.

These defendants were directors and stockholders in the De Soto. The stock of that company was assigned as agreed; the one hundred thousand dollars of securities were released and turned over to these trustees, eleven of the bonds were placed with the sureties, and the other assets of the DeSoto were divided among the stockholders. These defendants then gave to each stockholder a certificate stating the proportionate share of the eleven bonds to which he would be entitled at the expiration of five years, that being the length of time for which the securities were to stand liable on the indemnity bond. The five years had elapsed when this suit was brought.

1. While two resolutions speak of the bonds as the assets and securities of the "company," still the object and purpose of the whole of these transactions was to provide a fund for the payment of the outstanding policies and to make a distribution of the remaining assets among the stockholders. The three trustees had conferred upon them ample power to receive the property and distribute the same. There were but eleven of the stockholders, all of whom agreed to the entire transaction. The eleven bonds were not divided by an actual delivery, but they became the property of the stockholders in the proportions stated in the certificates, signed by the securities on the indemnity bond, as against all the world, except creditors of the De Soto. The claim made here by the receiver, that they remained the absolute property of the company cannot be maintained without disregarding the substance of these transactions.

2. The question still remains, whether he has any equitable claim to any part of the bonds. If he has, it is to work out an equitable lien in favor of creditors.

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The Mound City, as we have seen, deposited its own securities with the insurance department, in lieu of those withdrawn by the De Soto. These were again withdrawn in 1875, and ten notes, each for ten thousand dollars, substituted therefor. These ten notes and thirty others, each for ten thousand dollars, made by the Mound City, under its then name of the St. Louis Life Insurance Company, were secured by a deed of trust on real estate. The name of that company was again changed to the Columbia Life Insurance Company, and in 1877 it became insolvent, was dissolved and a receiver appointed. The deed of trust was foreclosed, and upon an intervening petition of the plaintiff, he was adjudged to have a lien on one-fourth of the proceeds, amounting to about seventy thousand dollars for the payment of the demands of the policy holders in the De Soto. Their demands, however, amount to only \$5,569.17, and are, therefore, amply secured. If the receiver has money or property in his hands sufficient to also pay the costs of the receivership, then this suit should fail without further inquiry. But it seems the judgment on the intervening petition only goes to the extent of paying the debts due to policy holders, and the costs in that particular suit, and the receiver of the Columbia was adjudged to be entitled to the balance for the creditors of that corporation. The directors and stockholders of the De Soto took all of the assets of that corporation in 1874. The directors then resigned, and persons interested in the Mound City took their places; these new directors held no meetings; there was no need of their doing so, for the De Soto was a mere shell with no property whatever. That the assets received by the stockholders under these circumstances constituted a trust fund for the payment of the debts of the corporation is well settled. An equitable lien existed in favor of the creditors for the payment of their debts. *Gill v. Balis*, 72 Mo. 424; *Bartlett v. Drew*, 57 N. Y. 587; *Hastings v. Drew*, 76 N. Y. 9; *Sawyer v.*

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Hoag, 17 Wall. 610. These bonds still remain in the hands of the distributees, and this equitable lien may be enforced against them for anything that appears in this record.

There is no doubt but the directors and stockholders of the De Soto acted in perfect good faith and intended to make ample provision for the debts, but they, and not the creditors, must answer for the failure of the Mound City to comply with its contract. They put the corporation out of their own hands and a receiver became necessary, both to claim the rights of that company as against the Columbia, and to adjust the demands of the policy holders of the De Soto. The costs in doing all this are but incidental to the liquidation of these policies, and we cannot see why these costs are not as much a lien on the bonds as the debts themselves. The receiver has no right to resort to the bonds further than is necessary to pay the debts and reasonable costs of the receivership. He must, on the one hand, be charged with all moneys received from the foreclosure suit, and all other property in his hands; and on the other, is entitled to credit for the allowed demands in favor of creditors paid and to be paid, and reasonable costs of the receivership. We do not say that the bill of costs presented to the referee in this case is reasonable. His costs that have not been, will, of course, be allowed by the court by which he was appointed, or not considered.

If all the parties interested in these bonds are not before the court, the defendants can have them brought in. We do not see why all these matters cannot be settled in this suit, and to that end the judgment is reversed and the cause remanded. All concur.

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THE STATE *ex rel.* EWING, *Appellant*, v. FRANCIS.

1. **Constitution:** CONTESTED ELECTION CASES: OPENING BALLOTS. Ballots cast at an election cannot, under the constitution, article 8, sections 3 and 9, be opened and inspected, except in cases of contested elections.
2. **Quo Warranto.** A *quo warranto* proceeding is not a contested election case within the meaning of the constitution, and ballots cannot be inspected therein.
2. —. A *quo warranto* proceeding adjudges the right to the office to no one; it only determines whether the person exercising it is a usurper and ousts him if the judgment is in favor of the relator.

Appeal from the Circuit Court of the City of St. Louis. — HON. SHEPARD BARCLAY, Judge.

AFFIRMED.

Dyer, Lee & Ellis, G. D. Reynolds and A. R. Taylor for appellant.

(1) The act of March 27, 1883, is not limited in its operation to election contests under 2 Revised Statutes, chapter 101, but includes election contests where the remedy is by information in the nature of *quo warranto*. *Quo warranto* has been recognized by the Supreme Court of Missouri during all the time our statute has contained a provision for statutory contests as the most effectual, complete and comprehensive remedy in all cases of contested elections, especially for the great offices of the state. *State v. McBride*, 4 Mo. 303; *State v. Merry*, 3 Mo. 278; *St. Louis Co. v. Sparks*, 10 Mo. 118; *State, etc., v. King*, 17 Mo. 511; *State, etc., v. Ewing*, 17 Mo. 515; *State, etc., v. Scott*, 17 Mo. 521; *State, etc., v. Stone*, 25 Mo. 555; *State, etc., v. Lingo*, 26 Mo. 496.

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Quo warranto is a civil remedy to try the title to an office. *State, etc., v. Stewart*, 32 Mo. 379; *State, etc., v. Lawrence*, 38 Mo. 535; *State, etc., v. Howard Co. Court*, 41 Mo. 246; *State, etc., v. Buskirk*, 43 Mo. 3; *State, etc., v. Kupferle*, 44 Ind. 155. *Quo warranto* is the proper remedy to determine contested elections. *State, etc., v. Ralls County Court*, 45 Mo. 58; *State, etc., v. Boal*, 46 Mo. 528; *State, etc., v. Vail*, 53 Mo. 97; *State, etc., v. Claggett*, 73 Mo. 338; *State, etc., v. John*, 81 Mo. 17. (2) Had the legislature intended to limit the application of the act of 1883 to the statute on the subject of election contests, the act would doubtless have been declared as amendatory of, or supplemental to, that statute—but there is no reference in the act of 1883 to the election statutes of the state. It stands independent and alone, and manifestly was intended to be as broad in its application as the constitutional mandate itself; it is unlimited, disconnected with other statutes of the state, and is clearly intended to fully declare a remedy applicable to all cases within the purview of the constitution. *Humes v. R. R.*, 82 Mo. 227; *Neenan v. Smith*, 50 Mo. 526; *Connor v. R. R.*, 59 Mo. 293; *State v. Kinney*, 44 Mo. 283; *Frazier v. Gibson*, 7 Mo. 271; *Smith v. R. R.*, 61 Mo. 17; *Keferstein v. Senkton*, 52 Mo. 234; *Spiller v. Young*, 63 Mo. 43; *State ex rel. v. King*, 44 Mo. 283; *Ind., etc., v. Blackman*, 63 Ill. 117; *Smith v. People*, 47 N. Y. 330; *State v. Blair*, 32 Ind. 313; *Reynolds v. State*, 61 Ind. 393; *State, etc., v. Stewart*, 26 Ohio St. 216.

James O. Broadhead, Leverett Bell and J. H. Overall for respondent.

(1) The act of March 27, 1883 (Laws, 1883, p. 91), has no application to the present proceeding. That act is, by its terms and effect, limited to a case of contested

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election, and contains no authority to open the ballot boxes in any other proceeding. (2) The legislature had not the power to extend the provisions of said act beyond a case of contested election. Const., art. 8, sec. 3. (3) A case of contested election is one in which a judgment can be rendered in favor of the contestor and against the contestee for the possession of the office. No such judgment can be rendered in a proceeding by a *quo warranto*. *State v. Vail*, 53 Mo. 111; *State v. Townsley*, 56 Mo. 107; R. S., sec. 3790, p. 646. (4) The provisions of the constitution of 1875 and the law of 1883 relate to contests between respective claimants to the particular office in question, and must be held to exclude, as between such claimants, all other remedies. The mode prescribed by the constitution does not mean a proceeding by *quo warranto*, or under the statute of *quo warranto*.

HENRY, C. J.—This is a proceeding in the nature of a *quo warranto*, commenced in the circuit court of the city of St. Louis. The petition avers that on Tuesday, seventh of April, 1885, an election was duly held in the city of St. Louis, for certain offices in and for said city, including that of mayor. That at said election, the relator and respondent were candidates for said office, and that relator then had, and now has, all the qualifications for said office prescribed by law. That he received a larger number of legal votes than were cast for respondent, or any other candidate, and was duly elected. That illegal and void ballots were counted for respondent, and were canvassed and counted as having been voted for respondent. The petition asked judgment of ouster against respondent and that relator be put in possession of said office.

The respondent pleaded to the information, denying all the averments as to illegal ballots, and denying that

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relator received a greater number of votes than he. On a trial of said cause, proof was offered, showing that relator was qualified, as by law required, for the office, and asked for a writ directed to the recorder of voters for said city, to permit an inspection of the ballots in the ballot boxes, which was refused by the court, which then gave judgment against relator, and the cause is here on appeal.

The only question we have to determine is in relation to the action of the court in refusing the application for the writ to the recorder of voters.

The constitution, article 8, section 3, is as follows: "All elections by the people shall be by ballot; every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the voter who presents the ballot. The election officers shall be sworn or affirmed not to disclose how any voter shall have voted, unless required to do so as witnesses in a judicial proceeding: *Provided, that in all cases of contested elections*, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law."

"Sec. 9. The trial and determination of contested elections of all public offices, whether state, judicial, municipal or local, except Governor and Lieutenant-Governor, shall be by the courts of law, or by one or more of the judges thereof. The General Assembly shall, by general law, designate the court or judge by whom the several classes of election contests shall be tried, and regulate the manner of trial, and all matters incident thereto; *but no such law, assigning jurisdiction or regulating its exercise, shall apply to any contest arising out of any election held before said law shall take effect.*"

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That the ballots can only be counted and compared with the list of votes, in cases of *contested elections*, we think, beyond question. The constitution prohibits an election officer from disclosing how any voter voted, unless required to testify as a witness in a judicial proceeding, and makes admissible secondary evidence of a fact, which is preserved in documentary form; and provides, "that in all contested election cases" the ballots may be inspected, etc.; but, even then, only under such safeguards as the legislature may prescribe. *Expressio unius est exclusio alterius*.

The question then arises, what is meant by the phrase, "contested elections," as employed in the above sections of the constitution? Relator's contention is, that it relates to any proceeding in which the election of one holding an office is contested, while respondent insists that it relates only to statutory contests in which the contestant seeks not only to oust the intruder, but to have himself inducted into the office. The latter, we think, the correct view, and the sense in which the phrase is employed in section three is made manifest in section nine, which provides that the general assembly shall, by general law, designate the court, or judge, by whom the several classes of election contests shall be tried, and regulate the manner of trial, and all matters incident thereto. That the proviso in the third section of the constitution relates to the same contest mentioned in the ninth, there can be no question, and that it has no relation to *quo warranto* proceedings, we think, evident. A *quo warranto* proceeding in the circuit court is not an election contest, in the same sense in which those terms are used in the third and ninth sections of the constitution. That proceeding only determines that the person holding the office is or is not a usurper, but ousting him, if the court finds against him, it adjudges the right to the office to no one. This is clear from section

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3790, which declares what the judgment of the court, in such case, shall be, a judgment of ouster, and in favor of the relator for costs, if the finding be against the defendant, or if for defendant, that he shall recover his costs against the relator.

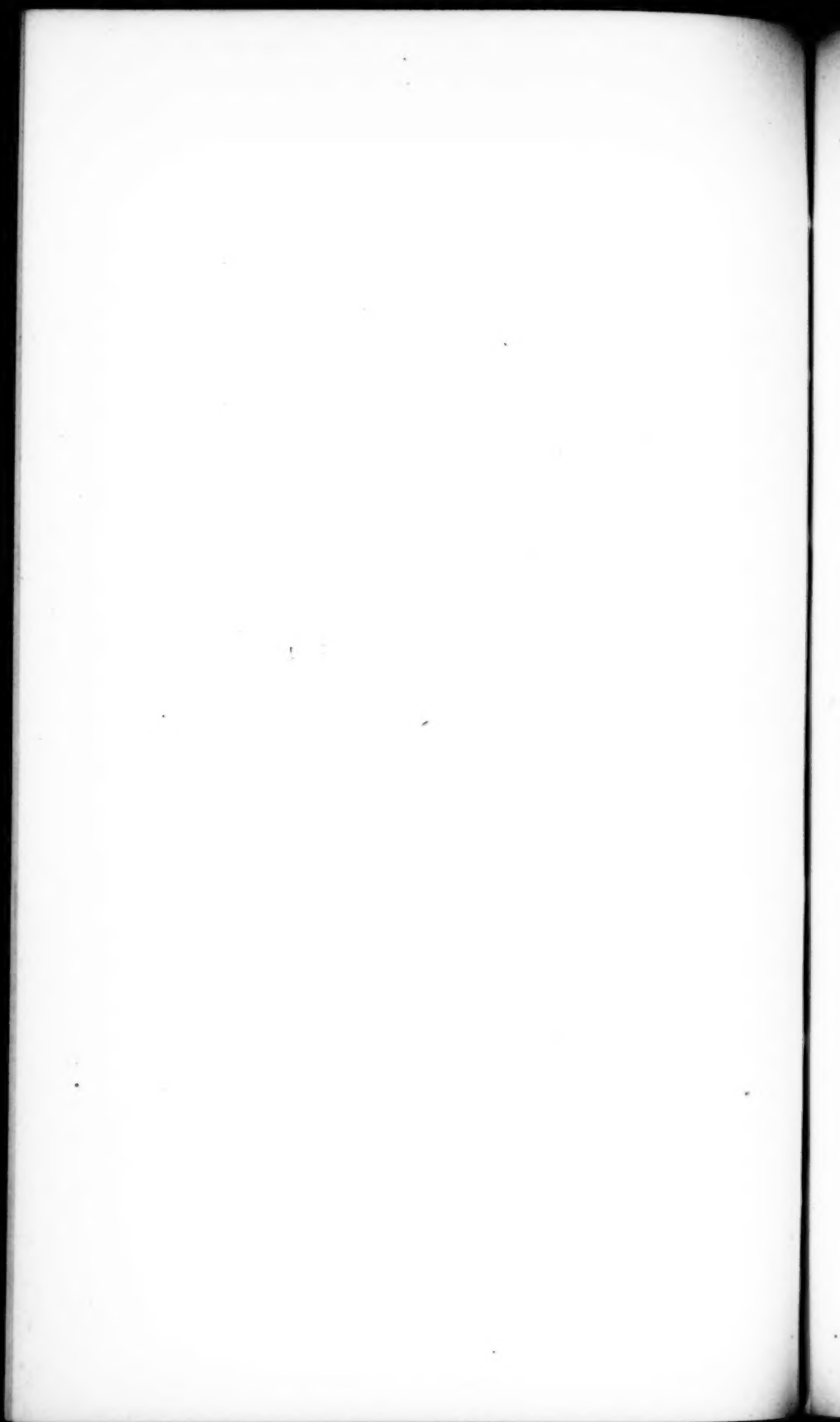
When the general assembly, in obedience to the constitutional mandate, designates, by general law, the court, or courts, or judge, by whom election contests shall be tried, and regulates the manner of trial, and all incidents thereto, from that moment the jurisdiction of courts, or judges, not thus designated, ceases, if they possessed it before, and the courts to which the jurisdiction is confided must exercise it as prescribed by law. The contested election cases in which the ballots may be inspected are those which the constitution requires the general assembly to designate the court or judge to try, and, therefore, no inspection can be had in any other case.

The concluding paragraph of section nine of the constitution, *supra*, is a provision to prevent the general law passed, assigning jurisdiction and regulating its exercise, from having a retrospective operation; but the proviso in section eight operates at once to preserve the inviolability of the ballot and prevent an inspection of ballots, until the enactment of a law prescribing when and how such inspection shall be had. But it is asked, has the constitution deprived the state of Missouri of the right to inspect the ballots, when she seeks to expel an intruder from office? Shall she not be permitted to have the ballots opened, when necessary to convict illegal voters? The constitution names one class of cases in which they may be inspected, and, unless the supposed cases belong to that class, the state has no more right than an individual suitor to an inspection of the ballots. She is as much bound by the constitution as any citizen, and if she has chosen, by her organic law,

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to tie her hands in this matter, it is not in our power to release her from restrictions she has imposed upon herself.

The emergency requiring an immediate determination of this controversy, we have not had the time to elaborate the views herein expressed, which we would desire, but are entirely satisfied with the correctness of our conclusions. All concur, except Norton, J., absent.



CASES DETERMINED
BY THE
SUPREME COURT
OF
THE STATE OF MISSOURI
AT THE
APRIL TERM, 1883.

Roesler *et al.*, Appellants, v. The Citizens' Bank of
Memphis.

Practice in Supreme Court : BILL OF EXCEPTIONS. Where there is
no order of the court authenticating the bill of exceptions, the
Supreme Court will consider nothing but the record proper.

Appeal from Scotland Circuit Court.—HON. BEN. E.
TURNER, Judge.

AFFIRMED.

John C. Moore for appellants.

Smith & Krauthoff and *N. M. Pettingill* for re-
spondent.

PER CURIAM.—No bill of exceptions in this cause,
(565)

Meier v. Meier.

as there is no order of the court authenticating what purports to be such bill. Under the uniform ruling of this court, there is nothing left to consider but the record proper, and as there is no error therein, judgment is affirmed. *Dinwiddie v. Jacobs*, 82 Mo 195. Black, J., dissents.

MEIER V. MEIER, *Appellant*.

Insurance: LIENS: VOLUNTARY PAYMENTS FOR ANOTHER. Premiums of insurance voluntary paid on the life of another cannot, in the absence of any understanding, be recovered of the beneficiary, and the person so paying has no lien for such payments, upon the proceeds of the insurance collected by him as the agent of such beneficiary.*

Appeal from St. Louis Court of Appeals.

AFFIRMED.

A. M. Gardner for appellant.

Eber Peacock for respondent.

PER CURIAM.—The judgment in this case is hereby affirmed on the ground and for the reasons stated in the opinion of the St. Louis court of appeals, 15 Mo. App. 68.

* This syllabus is taken from 15 Mo. App. 68.

Johnson v. Lullman.

JOHNSON, *Assignee, Appellant*, v. LULLMAN, *Administrator, Respondent*.

1. **Practice: PRESUMPTIONS.** The cause having been tried by the court without a jury, and no declarations of law having been asked or given, it will be presumed on appeal, that the court entertained correct views of law, and if there is substantial evidence to support the judgment, it will be affirmed.
2. **Corporations: STOCK: PRESUMPTIONS.** The presumption is that a certificate of stock in the usual form is full paid, and a purchaser who takes it without notice, is not liable to creditors if the company's representations that the stock is full paid are false.
3. —: **LIABILITY OF STOCKHOLDERS: SURRENDER OF STOCK.** A stockholder who surrenders unpaid stock to the corporation is not liable thereon to a creditor of the corporation whose demand accrued after the surrender.*

Appeal from St. Louis Court of Appeals.

AFFIRMED.

C. H. Krum and Smith & Harrison for appellant.

Taylor & Pollard for respondent.

PER CURIAM.—This case is before us on appeal from the judgment of the St. Louis court of appeals, affirming the judgment of the circuit court rendered in defendant's favor. After a full examination of the case, we affirm the judgment on the grounds and for the reasons stated in the opinion of the court of appeals. *Johnson v. Lullman*, 15 Mo. App. 55.

* These syllabi are taken from 15 Mo. App. 55.

The State v. Palmer.

THE STATE V. PALMER, *Appellant.*

1. **Practice, Criminal : DEFENDANT AS A WITNESS : EVIDENCE.** Where the defendant in a criminal cause offers himself as a witness, he is subject to the same rules and tests, and can be impeached in the same manner as any other witness, except that he cannot be cross-examined as to any matter not referred to by him in his examination in chief.
2. ——— : **EVIDENCE : MORAL CHARACTER.** If the defendant does not offer himself as a witness, the state cannot attack his general moral character, unless he first introduces evidence in his own behalf in that regard. And the state need proceed no further than to elicit from the witness that defendant's general moral character is bad, leaving defendant to cross-examine the witness as to particulars, if he so desires.
3. ——— : **INSTRUCTION.** Before the jury are at liberty to disregard the testimony of a witness, they must believe that such witness has wilfully and knowingly sworn falsely to a material fact in the case, and there must be a sufficient basis in the testimony to warrant the giving of an instruction to that effect.
4. ——— : ——— : **DEFENDANT ACTING ON APPEARANCES.** A defendant who acts in self-defence in a moment of apparently impending peril is not required to nicely gauge the proper *quantum* of force necessary to repel the assault of his assailant, but may act upon appearances and use such force as he had reasonable cause at the time to believe was necessary.
5. ——— : ———. The evidence in this case held sufficient to justify the giving of instructions for murder in the first and second degrees.
6. ——— : ——— : **EVIDENCE.** The defendant in a criminal case has a right to testify as to the intent with which he acted, and his testimony for the purpose of instructing the jury occupies the same footing as that of any other witness, and where he testifies that he did not intend to kill the deceased, he is entitled to an instruction for a lower grade of homicide than murder in either degree.
7. ——— : **INSTRUCTIONS.** It is the duty of the trial court in a criminal cause to give all necessary instructions, whether asked to do so or not.

The State v. Palmer.

Appeal from Cooper Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED.

The following is the eleventh instruction given for the state:

“If the jury believe, from the evidence, that the defendant and the deceased, prior to their meeting in Ashcraft's store, had an altercation, and that the defendant afterward went into said store and there met the deceased, and that a difficulty arose between them, and that the deceased advanced towards the defendant in a threatening manner, and if the jury shall further find, from all the facts and circumstances in evidence, that the defendant had reasonable cause to believe, and did believe, that the deceased intended to do him some great bodily harm, and that there was imminent danger of said design being carried into execution, then he had the right to act upon appearances as they presented themselves to him at the time, and if he threw the weight to protect himself from such attack, and in doing so used no more force than was necessary for that purpose, then the jury must find the defendant not guilty, although they may believe that as a matter of fact said appearances were false, and that the deceased did not intend to do him great bodily harm, and that there was no immediate danger thereof.”

Draffen & Williams for appellant.

(1) The tenth instruction, given at the instance of the state, is clearly and manifestly erroneous. *Bank v. Murdock*, 62 Mo. 70; *State v. Elkins*, 63 Mo. 159; *Evans v. Ry. Co.*, 16 Mo. App. 522; *Fath v. Hoke*, 16 Mo. App. 537. (2) The court erred in permitting witnesses to state that defendant's general moral character was bad with-

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out eliciting in what particular this was so. *State v. Shields*, 13 Mo. 236. (3) The eleventh instruction, upon the subject of self-defence, was erroneous. *Nichols v. Winfrey*, 79 Mo. 544. (4) The court erred in failing to instruct the jury as to manslaughter in the second and third degrees. It was the duty of the court to give proper instructions, whether asked or not, defining each offence of which the defendant, under the evidence, could have been convicted. *State v. Branstetter*, 65 Mo. 149. The defendant stated that he did not intend to kill the deceased. He had the right to testify as to his intent. *State v. Banks*, 73 Mo. 592; *State v. Tate*, 12 Mo. App. 327. The jury would have been perfectly justifiable in finding, under the evidence, that there was no intention on defendant's part to kill the deceased. This might have been found from the fact that the witnesses say that he only gave the weight a jerk or sling; that he did not throw it with force. But the defendant's evidence in regard to intent must be taken into consideration in determining what instructions should be given. *State v. Tate*, 12 Mo. App. 327; *State v. Banks*, 73 Mo. 592. The defendant was not guilty of murder in either, the first or second degree, unless there was an intent to kill. *State v. Gassert*, 65 Mo. 352. The jury may have well found, under the evidence in this case, that the defendant did not intend to kill the deceased, and yet, that it was not justifiable or excusable homicide. If this be true, then the court should have given instructions as to manslaughter. *State v. Gassert*, 65 Mo. 352; *State v. Branstetter*, 65 Mo. 149.

B. G. Boone, Attorney General, for the state.

The state introduced and the court admitted evidence to prove that defendant's character was bad. This was erroneous, as he had not put his character in issue.

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State v. Creason, 38 Mo. 372; *State v. Williams*, 77 Mo. 314. The tenth instruction as to the credibility of witnesses, does not follow the form heretofore approved by this court. *State v. Dwire*, 25 Mo. 554; *State v. Elkins*, 63 Mo. 159; *Brown v. Ry. Co.*, 66 Mo. 599. The instruction, however, as given by the trial court, has been approved by the Supreme Court of Kansas in *Campbel v. State*, 3 Kan. 488. The evidence clearly showed that the defendant was guilty, either of murder in the first or second degree, or that the killing was justifiable. Under this state of facts, the court was not authorized to give an instruction for manslaughter in any degree. *State v. Kilgore*, 70 Mo. 547; *State v. Ellis*, 74 Mo. 207; *State v. Johnson*, 76 Mo. 121; *State v. Snell*, 78 Mo. 240; *State v. Jones*, 79 Mo. 441; *State v. Ramsey*, 82 Mo. 133.

SHERWOOD, J.—Tried for murder in the first degree, defendant was convicted of murder in the second degree, and his punishment fixed at fifteen years in the penitentiary.

I. There was no error in permitting the state to introduce evidence in the first instance of the general moral character of the defendant being bad. He had offered himself as a witness, therefore, was subject to the same rules and tests, and could be impeached in the same manner as any other witness. *State v. Clinton*, 67 Mo. 330. Had the defendant not been a witness, then the state could not have attacked the general moral character of the defendant, unless he had first introduced evidence in his own behalf in that regard. *State v. Creson*, 38 Mo. 372. The only exception to the position here taken, as to a defendant being subject to same rules and tests, is that created by statute and relates to certain restrictions as to the extent to which the cross-examination of a defendant witness may go. And it was sufficient for the purpose of impeachment that the inquiry on part of

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the prosecution should proceed no further than to elicit from the witness that the general moral character of the defendant was bad. *State v. Grant*, 79 Mo. 113. If the defendant's counsel desired to descend into particulars, this opportunity was afforded them by cross-examination, and there exists on this score no ground of complaint.

II. There was error in the tenth instruction given at the instance of the state, in that this instruction omitted any word or expression requiring that the testimony of a witness in order to be disregarded should have been knowingly or wilfully false. *Bank v. Murdock*, 62 Mo. 70; *State v. Elkins*, 63 Mo. 159; *White v. Maxey*, 64 Mo. 552. And the authorities just cited go to the extent of holding that there must be a sufficient basis in the testimony for any instruction on the point in hand, even though the instruction be correctly worded.

III. The eleventh instruction on behalf of the state was erroneous for that it introduces an unwarranted element. If the defendant acted in a moment of apparently impending peril, it was not for him to nicely gauge the proper *quantum* of force necessary to repel the assault of the deceased. *Nichols v. Winfrey*, 79 Mo. 544; *Morgan v. Durfee*, 69 Mo. 469.

IV. There was evidence which justified the giving of instructions for the different degrees of murder. The putting by defendant of a lethal weapon, the weight, in his pocket, prior to the fatal occurrence, and its subsequent use, and his alleged remark to Scott, were indicative of malice. If such preparation was made with a view to legitimate self-defence, this would put a different face on the transaction, and of that the jury under proper instructions were to judge. But an instruction was also warranted for a lower grade of homicide than either of the degrees of murder. The defendant had testified that when he struck he did not intend to kill the deceased. If this statement was true he was not guilty of murder

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in any degree. And he had a right to testify as to his intent, and his testimony for the purpose of instructing the jury occupied the same footing as that of any other witness. *State v. Banks*, 73 Mo. 592; *Nichols v. Winfrey*, *supra*. And it was the duty of the trial court to give all necessary instructions, whether asked or not, as has been frequently decided by this court.

For the errors aforesaid, judgment reversed and cause remanded. All concur.

THE CITY OF ST. LOUIS, *Appellant*, v. CLABBY.

Fees in Cases of Felonies: STATUTE: CITY OF ST. LOUIS. Fees collected from the state by the clerk of the criminal court of the city of St. Louis, in cases of felonies and not called for by the persons entitled to them, should, under Revised Statutes, sections 5633 to 5639, be paid into the city treasury.

Appeal from St. Louis Court of Appeals.

REVERSED.

Leverett Bell for appellant:

Chas. F. Joy and *C. C. Simmons* for respondent.

PER CURIAM.—Clabby, who is clerk of the St. Louis criminal court, has in his possession fees belonging to persons other than himself, and which he collected from the state of Missouri in cases of felony, and which he holds, as such clerk, for the parties entitled thereto. The fees not having been demanded by the parties entitled to them, the question is whether he should pay

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them over to the city of St. Louis, or into the state treasury. Chapter 103, Revised Statutes, 1879, except sections 5646 to 5649, was enacted in the form of a revised bill approved on the twenty-second day of May, 1879, and contains a clause repealing all prior inconsistent acts, and hence, the sections on the same subject in the prior act of May 10, 1879, were, by the revised bill, repealed, so that sections 5633 to 5639, Revised Statutes, stand as the existing law. Sections 5633 and 5635 are broad enough to include fees collected by the clerk from the state. The word, *county*, in the latter section is to be construed as including the city of St. Louis. Section 3126, par. 19. These fees should be paid into the city treasury.

The judgment is, therefore, reversed and the cause remanded, with directions to the trial court to enter a judgment in conformity thereto

FALCONER V. ROBERTS, *Appellant*.

1. **Ejectment by Tenant in Common : PLEADING.** In an action of ejectment by one tenant in common against his co-tenant, under a petition in the ordinary form as prescribed by the statute, a recovery may be had where the proof shows an ouster or act amounting to a total denial of plaintiff's right.
2. **The Evidence** in this case held sufficient to warrant the finding of the trial court that defendant had ousted and excluded plaintiff from the possession of the premises.
3. **Ejectment : RENTS AND PROFITS : DAMAGES.** In an action of ejectment by one tenant in common against his co-tenant, where plaintiff recovers possession of an undivided one-third of the premises, he is also entitled to recover damages, rents and profits from the

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date of the ouster, subject to the limitations in section 2252, Revised Statutes.

4. The amount of damages, rents and profits assessed by the court held to be correct under the evidence.

Appeal from Carroll Circuit Court.—J. L. MIRICK,
Esq., Special Judge.

AFFIRMED.

Hale & Sons for appellant.

(1) The court erred in assessing the damages. There is no evidence that the land not in cultivation was worth anything. See sec. 2252, R. S.; *Robidoux v. Casseleggi*, 81 Mo. 459. (2) The instructions for plaintiff, if given by the court as shown by the record, are wholly unauthorized by the law or the facts. (3) Defendant's first instruction should have been given. Plaintiff cannot recover on this petition against his co-tenant. *Northrup v. Wright*, 24 Wend. 221; *Lapeyre v. Paul*, 47 Mo. 586; *Warfield v. Lindell*, 30 Mo. 272; *Ragan v. McClurg*, 29 Mo. 356. The answer being a general denial, is not evidence of the ouster at the time alleged in the petition. *La Riviere v. La Riviere*, 77 Mo. 512. (4) Defendant's third instruction should have been given. Plaintiff cannot recover damages, rents and profits based wholly on the improvements which his co-tenant had made. G. S., ch. 151, secs. 20, 22; *Fenwick v. Gill*, 38 Mo. 510. (5) The court erred in refusing to give the fourth and fifth instructions asked by defendant. Defendant was not liable for rents and profits. 1 Wash. on Real Prop. [4 Ed.] p. 662, secs. 3, 15; *Sargent v. Parsons*, 12 Mass. 149; *Calhoun v. Curtis*, 4 Met. 413; *Keisel v. Earnest*, 2 Pa. St. 90; *Kline v. Jacobs*, 68 Pa. St. 57; *Israel v. Israel*, 30 Md. 120; 60 Barb. 163; 52 Ill. 332. (6) There is nothing in the record to show an ouster. Possession alone for an unlimited time does not

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constitute an ouster. There must be open and notorious acts of exclusive ownership. *Warfield v. Lindell*, 30 Mo. 272; 38 Mo. 583. Trespass or ejectment cannot be maintained by one co-tenant against another unless he has been actually ousted or expelled from the premises. *Murray v. Hall*, 7 C. B. 441, 554; *Stilloway v. Brown*, 12 Allen, 37.

Lewis A. Chapman for respondent.

(1) The court did not err in estimating the monthly rents and profits. (2) The court properly refused the first instruction asked by defendant. The ouster in the case was admitted by the general denial; but there was plenty of evidence of an ouster, a portion of which defendant has left out of his abstract. *La Riviere v. La Riviere*, 77 Mo. 512; *Peterson v. Laik*, 24 Mo. 514; Sedgwick and Wait's Trial of Titles to Land, sec. 283, p. 168; *Siglar v. Van Riper*, 10 Wend. 414; *Harrison v. Tabor*, 33 Mo. 311; *Miller v. Myers*, 46 Cal. 535; *Greer v. Tripp*, 56 Cal. 209. No proof of actual physical force or turning out by the "shoulders" or the "heels" is necessary. *Gale v. Hinds*, 17 Fla. 773; *Doe v. Prosser*, Cowper, 217. The court had a right to infer an ouster from the evidence of a demand of possession, and a refusal on the part of the defendant which was uncontradicted. *Miller v. Myers*, 46 Cal. 535; *Greer v. Tripp*, 56 Cal. 209; Sedgwick and Wait's Trial of Titles to Land, p. 168, sec. 283. The denial of plaintiff's title, accompanied by an exclusive claim of possession, and receipt of the whole profits, is sufficient to establish an ouster. *Alexander v. Kennedy*, 19 Texas, 488; *Siglar v. Van Riper*, 10 Wend. [N. Y.] 414; *Humbert v. Trinity Church*, 24 Wend. 587. (3) Defendant has no right to complain of the court's refusal to give the fourth and fifth instructions asked by him. He could not recover in this action for the improvements, and certainly not without proving

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their value and asking for them. Wash. on Real Prop., 645, 653; *Deck's Appeal*, 57 Pa. St. 472; *Israel v. Israel*, 30 Md. 128. Defendant made these improvements with full knowledge that another party owned one-third interest in the land.

RAY, J.—This is an action of ejectment to recover certain described land in Carroll county, Missouri. The petition is in the usual form. The answer admits the possession of defendant, and is otherwise a general denial. The cause was tried before Hon. John L. Mirick, sitting as a special judge, and was tried by the court without the intervention of a jury. The court found for the plaintiff for an undivided one-third of the land described in the petition; assessed the damages at the sum of two hundred dollars, and the rents and profits at the sum of \$16.66 $\frac{2}{3}$ per month, and rendered judgment in the usual form from which defendant has appealed.

Plaintiff and defendant are tenants in common in the premises in suit, the plaintiff being the owner of an undivided one-third interest in the land, and the defendant the owner of the undivided two-thirds interest therein. This, however, does not appear by the pleadings, but only by the evidence in the cause. The plaintiff in his petition does not set out the true interests of the parties, either plaintiff or defendant, according to their respective titles, but claims the whole tract and the right of possession to the whole tract; and it is contended in the first place for defendant that he cannot recover under such a petition, which treats the defendant as a trespasser and stranger, and wholly ignores the rights of defendant and the relation of co-tenancy. As to this it may be said, that the action of ejectment is a remedy afforded by the law where one tenant in common has been dispossessed by his co-tenant from the whole or any portion of the lands held in common. Our statute declares what

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the petition shall contain by way of necessary averments in actions of ejectment, and the petition in this case is in the prescribed form and contains the allegations required by the statute. Where the action, as in this case, is by one tenant in common against his co-tenant, section 2248 provides that plaintiff shall be required to show on the trial that the defendant actually ousted him, or did some act amounting to a total denial of his right as such co-tenant. Where, then, such action is authorized, the form prescribed therefor is a sufficient statement of plaintiff's cause of action, and if upon the trial between co-tenants the proof shows the ouster or act amounting to a total denial of plaintiff's right, a recovery may be had by one tenant in common against his co-tenant under a petition in the ordinary form prescribed for the action of ejectment. The principal question to be determined in the case is whether the defendant has excluded or ousted plaintiff from the possession of the common estate. As to this it is suggested and contended by plaintiff that defendant's answer of general denial is an admission that his possession is adverse and equivalent to a confession of ouster superseding the necessity of proof on the trial. *La Riviere v. La Riviere*, 77 Mo. 512; 24 Mo. 541; 33 Mo. 211.

If plaintiff had declared on his title as it in fact was, and demanded possession of his true interest, there could be no doubt that such denial in the answer would have been an admission and sufficient evidence of ouster. The petition, however, being in the usual form employed in actions of ejectment, ignores the relation of co-tenancy and treats the defendant as an entire stranger and trespasser, and claims the right to the sole and exclusive possession of the whole tract. The answer denies these allegations and it is, to say the least of it, doubtful whether there is under this state of facts any denial of the co-tenancy which is not charged to exist in the petition, and in which there is no demand of the possession

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according to the plaintiff's true interest. We need not decide, however, whether the rule approved in cases *supra* applies in this case, as our conclusion is not based in whole or in part upon that ground. The evidence offered upon the trial shows, we think, an ouster and total denial of plaintiff's right within the meaning of the law. The bill of exceptions says among other things the plaintiff, by witnesses and a letter from defendant to him, produced evidence "tending to prove that plaintiff after he had purchased the undivided interest in the land, demanded of the defendant his interest therein, and that he have and be let into possession of his portion of said land, and that defendant refused to surrender to plaintiff any part of the land." The defendant did not offer any evidence tending to prove that such demand was not made by plaintiff, or that defendant had not refused to comply therewith, but as to this relies upon the insufficiency of the evidence as a matter of law to establish the ouster.

Plaintiff had not, it is true, any right to any particular portion of the land, but his demand to be let into the possession of the premises, and to which he was as much entitled as defendant, must be held and construed to mean a demand of possession according to his right as tenant in common, and this demand followed by a refusal on the part of defendant to comply therewith, is satisfactory evidence of an ouster. The letter of defendant to plaintiff to which reference is made, is not in the transcript nor the substance given, but it may be remarked as to this that the court having the letter before it, gave a declaration of law that the letter read in evidence, in regard to defendant's claim to the land in suit, was of itself sufficient to constitute ouster of plaintiff. We see nothing in the record authorizing us to question or disturb the finding of the trial court, that the defendant, who was in the sole and exclusive possession of the entire tract, had refused to suffer the plaintiff to occupy with

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him as his co-tenant, and had, therefore, ousted and excluded plaintiff from the possession.

Some question is made as to the plaintiff's right to recover damages and rents and profits in this action, but if plaintiff had the title and was entitled to recover his undivided third interest in the land, he was entitled to recover also damages and rents and profits from the date of the ouster. Where the plaintiff prevails in the action of ejectment, damages and rents and profits follow under the provisions and subject to the limitations in section 2252, Revised Statutes. Objection is made also to the amount of damages assessed. The calculation which defendant claims to be correct, excludes the forty acres not in cultivation upon the theory that the evidence does not show the land not in cultivation to be of any value. Plaintiff's evidence, however, estimates the land, that is the entire tract, and on the average at \$2.50 per acre, whereas the estimate made by defendant's witnesses is about the same, but is confined to the cultivated land. The trial court has adopted the former basis in the assessment of damages and the sum of two hundred dollars for one year from date of suit to the date of judgment is on this theory correct, for the undivided third of the two hundred and forty acres and the sum of \$16.66 $\frac{2}{3}$ as the value of monthly rents and profits is on this basis likewise correct. We see no such error in the court's action in the matter of giving and refusing declarations of law as calls for and requires us to reverse the judgment upon that ground. Even if some of them are to some extent inaccurate, yet the judgment is, we think, manifestly for the right party and should not be disturbed, and is accordingly affirmed. All concur.

Smith v. Dye.

SMITH, *Appellant*, v. DYE.

1. **Vendor and Vendee : FRAUDULENT REPRESENTATIONS.** Fraudulent representations by a vendor to the vendee must, in order to set aside the conveyance, be as to a material fact, must be likely to deceive, must have been relied upon, and must have contributed directly to the injury.
2. — : —. A statement by the vendor, an attorney, that the allowed claim against a receiver, sold by him to another attorney, would be collected, cannot be made the foundation of an action by the latter, where the former stated all the material facts bearing on the claim sold.*

Appeal from St. Louis Court of Appeals.

AFFIRMED

Henry H. Dennison for appellant.

Truman A. Post for respondent.

PER CURIAM.—This case is affirmed on the authority of the opinion of the court of appeals. 15 Mo. App. 585. Sherwood, J., dissents.

* These syllabi are taken from 15 Mo. App. 585.

The State v. Gleason.

THE STATE V. GLEASON, *Appellant*.

1. **Criminal Practice: CHANGE OF VENUE.** When a change of venue is awarded in a criminal cause the court should order the removal of the body of the defendant to the county to which the venue is changed. R. S., sec. 1867. But a failure to then make the order of removal will not deprive the court of the right to make it afterwards.
2. ———: JURORS. The objection that the jurors who tried the defendant were not of the standing jurors selected by the county court, held not well taken, it not appearing but that such latter jurors were engaged in the trial of other causes.
3. ———: ———. The statute with respect to the manner of selecting jurors is directory.
4. ———: ———. The trial court has the right to direct its officers to summon additional jurors or an entire panel as the dispatch of business may demand.

Appeal from St. Charles Circuit Court.—HON. W. W. EDWARDS, Judge.

AFFIRMED.

Zack. J. Mitchell for appellant.

(1) The record shows that the change of venue was on account of the prejudice of the inhabitants of the nineteenth judicial district which included St. Charles county. (2) An order transferring the person of the defendant to the custody of the sheriff of St. Charles county was necessary to perfect the jurisdiction of the latter court. (3) The court erred in trying the defendant with a jury of by-standers and in denying him the regular panel of standing jurors.

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B. G. Boone, Attorney General, for the state.

(1) An affidavit for change of venue must be supported by legal and competent evidence. R. S., sec. 1859; *State v. Bohannon*, 76 Mo. 562. (2) When the case was transferred to St. Charles county, its circuit court became possessed of full jurisdiction. *State v. Elkins*, 63 Mo. 159. (3) Statutes in respect to the empanneling of juries in criminal cases are directory. *State v. Breen*, 59 Mo. 413; *State v. Pitts*, 58 Mo. 556; *State v. Knight*, 61 Mo. 373; *State v. Ward*, 74 Mo. 256, and cases cited. It is held generally that a strict compliance with statutory provisions prescribing the time and mode of summoning juries is not necessary. Whar. Cr. L. [3 Ed.] sec. 1041; Thom. & Mer. on Juries, sec. 47. From aught that appears from the record, it may have been that the regular panel had been exhausted by challenges or were engaged in another case. *State v. Jones*, 61 Mo. 232.

BLACK, J.—The defendant and others were indicted in the circuit court of St. Louis county for robbery in the first degree. After one mistrial, a severance was ordered, and the venue changed to St. Charles county, but it would seem no order was then made to remove the body of the defendant to that county. A transcript having been filed in the court to which the cause had been removed, the defendant by his attorney appeared there and moved the court to strike the cause from the docket; the motion was overruled. The St. Louis county circuit court, at next term after the venue was changed, ordered the defendant to be delivered to the jailer of St. Charles county, which was done. The cause coming on for hearing in that court, the defendant filed a plea to the jurisdiction and also challenged the array of petit jurors; the plea and motion were both overruled, and

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defendant refusing to plead, a plea of not guilty was entered, and upon a trial he was found guilty.

1. The petition for a change of venue was based upon two grounds, prejudice of the inhabitants of St. Louis county, and prejudice of the inhabitants of the entire nineteenth judicial circuit, of which St. Charles county is also a part. The claim is that the motion was sustained in its entirety, and that, therefore, the St. Charles circuit court acquired no jurisdiction. But this is a misconception of the record. The order recites that there was good cause for granting the motion because of prejudice of the inhabitants of St. Louis county, and then it is adjudged that the motion be sustained and the venue of the cause changed to the county of St. Charles, and the clerk is directed to forward a transcript of the proceedings to the circuit court of that county. The plain and only effect of the order was to sustain the application as to St. Louis county, and to overrule it, as to the entire circuit. How else could the cause have been removed to St. Charles county? The order is not susceptible of any other meaning. The St. Louis county circuit court should have ordered the body of the defendant removed, when the change of venue was awarded. Sec. 1867, R. S. But a failure to then make the order did not deprive that court of the power to thereafter make it. It was the plain duty of the court to direct the sheriff to remove the defendant to the jail of St. Charles county, even at a subsequent term. The St. Charles circuit court had full and complete jurisdiction when the cause was brought on for trial, and the previous irregularities gave the defendant no right to be discharged.

2. The objection to the jurors seems to have been that they were not of the standing jurors selected by the county court. The bill of exceptions concedes that there was no record entry showing that the regular jurors for that term had been discharged. It will be

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taken as a fact that the court had a panel of regular jurors at that term and that they had not been discharged. Still it does not appear but they were engaged in the consideration of other causes. The statute with respect to selecting jurors has always been regarded as directory. *State v. Pitts*, 58 Mo. 556; *State v. Knight*, 61 Mo. 373; *State v. Ward*, 74 Mo. 256. The trial court has a right to order its officers to bring in additional jurors, or an entire new panel, as the dispatch of the business may demand.

The judgment is affirmed. All concur.

THE STATE *ex rel.* CHASE *et al.*, Appellants, v. DAVIS *et al.*

Sheriff Acting as Trustee in Deed of Trust, Liability of Sureties of. Where parties in a deed of trust provide that in the event the trustee named therein shall refuse to act the then sheriff of the county shall execute the trust, and the trustee refuses to act, and the sheriff sells the land and fails to pay over a portion of the proceeds, his sureties are not liable on his official bond for such failure. But it would be otherwise if the sheriff were appointed in an appropriate proceeding by the circuit court to execute the trust.

Appeal from Moberly Court of Common Pleas.—HON.
G. H. BURCKHART, Judge.

AFFIRMED.

James Carr and *H. S. Priest* for appellant.

(1) If the *cestui que trust* had filed an *ex parte* petition in the circuit court of Randolph county to have

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had Sheriff Williams appointed to execute the trust described in the petition, and said court had appointed him, there is no doubt about the liability of the sureties on his official bond, if he had failed to pay over the money received from a sale under a deed of trust. *Tatum v. Holliday*, 59 Mo. 423; *State ex rel. v. Griffith*, 63 *Id.* 545; *State to use, etc., v. Taylor*, 6 Mo. App. 277; R. S., sec. 3929, *et seq.* (2) Sheriff Williams was chosen by the parties to the deed of trust, to execute it in the event the original trustee refused to execute it. He was chosen solely because he was sheriff, and had given good sureties on his official bond, upon whom the parties interested in the deed of trust could rely to make good any official delinquency of said Williams. *State v. Moore*, 19 Mo. 369; *State v. Powell*, 44 *Id.* 436. (3) Williams never could have acted under said deed of trust, and sold the property embraced therein, if he had not been sheriff. There is no difference in principle between Sheriff Williams acting under an *ex parte* order of the circuit court of Randolph county, in which event the sureties would have been liable beyond all peradventure, if there had been a delinquency, such as is developed by the record in this case, and Sheriff Williams, acting under said deed of trust, without such order, and solely because he was sheriff.

Ben. T. Hardin for respondents.

(1) The court below did right in sustaining the demurrer to plaintiff's petition. *Governor v. Perrine*, 23 Ala. 807; *Schloss v. White*, 16 Cal. 65; 10 Mo. 559; *Nolley v. Callaway Co.*, 11 Mo. 447; *State v. Boon*, 44 Mo. 254; *St. Louis v. Sickles*, 52 Mo. 122; *State v. Johnson*, 55 Mo. 80; *State v. Dallas*, 72 Mo. 331; *City v. Porter*, 76 Mo. 358; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *People v. Pennock*, 60 N. Y. 421; *Salttenberry v. Loucks*, 8 La. An. 95; *Hill v. Kemble*, 9 Cal. 71; *Scott v. State*.

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46 Ind. 203; Brandt Sur. & Guar., sec. 483; 43 Wis. 78; 10 Rep. 497; 46 Am. Dec. 506. (2) The cases in 59 Mo. 422, 63 Mo. 545, and 6 Mo. App. 277, cited by appellants, simply go to the extent of holding the securities on the official bond of a sheriff liable for money coming into his hands from sales made under deed of trust, where the sheriff had been appointed by the court to act under the statutes, and was carrying out an order of court as an officer. It is the appointment by the court under the statute that makes the sheriff act officially. "For the non-payment of money, unless received rightfully or wrongfully, *under color of official right*, there can be no responsibility on the bond." *Com. v. Cole*, 7 B. Monroe, 250; *Sherwood v. Saxton*, 63 Mo. 78. (3) "Obligations of sureties cannot be extended by implication." 10 Mo. 559; *Nolley v. Callaway*, 11 Mo 447; *St. Louis v. Sickles*, 52 Mo. 122; *State v. Johnson*, 55 Mo. 80; *State v. Dallas*, 72 Mo. 331; *State v. Boon*, 44 Mo. 254; *Harrisonville v. Porter*, 76 Mo. 358. The bond of Williams is conditioned on the faithful discharge of the duties imposed upon him by law as sheriff; and the obligation of the sureties to such bond cannot be so extended as to include neglect in matters wholly unconnected with official duty. *U. S. v. Kirkpatrick*, 9 Wheat. 720; *People v. Pennock*, 60 N. Y. 421; *Salttenberry v. Loucks*, 8 La. An. 95; *Nolley v. Callaway Co.*, 11 Mo. 462; *Hill v. Kemble*, 9 Cal. 71; *Scott v. State*, 46 Ind. 203; *St. Louis v. Sickles*, 52 Mo. 122, 127.

SHERWOOD, J.—This is a suit against the sureties of a sheriff on his official bond. The alleged delinquency for which they are sought to be made liable consists in the facts that certain parties, by a certain deed of trust, agreed and provided that in the event that Shackelford, the trustee, refused to act, that the then sheriff of Randolph county should execute the trust; that Shackelford refused to act, and the principal in the bond, Williams,

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the then sheriff, as substituted trustee, sold the land under the deed of trust, and failed to pay over a portion of the proceeds.

The question propounded by the demurrer is, do these facts, thus briefly outlined, constitute a cause of action against the sureties? The answer is: No! We have had in this state, ever since 1849, a provision whereby if a trustee in a deed of trust failed to act, the parties in interest might by appropriate procedure have the circuit court to appoint the sheriff of the county to act in the room and stead of the recalcitrant trustee. 2 R. S. 1855, p. 1554. This being the case, whenever, thereafter, a sheriff was elected and gave bond, he and his sureties were presumed to bear in mind the contingency mentioned by the statute, and to contract in reference thereto; for whatsoever the law annexes as the incident of a contract, becomes thereby as much a part and parcel thereof as if in terms inserted therein. *State ex rel. v. Berning*, 74 Mo. 87. Hence it has been held by this court that when, in the circumstances mentioned, a sheriff sold land under a deed of trust, he acted *colore officii*, and his sureties were bound for any of his official derelictions. In ruling thus the sureties were not held liable beyond the strict letter of their contract.

Here, however, a widely different case is presented. Parties by a private contract appoint beforehand whosoever, at an indefinite time in the future, may happen to be sheriff, to sell land under a deed of trust in case, etc. Who conferred authority on these private individuals to engage the liability of third persons, who happened to be sureties on a sheriff's bond? Suppose that the sheriff should fail to act in such case, would action lie on his bond for his failure in this regard? Clearly not. And why not? Because the law did not, at the time the sheriff gave bond and entered upon the duties of his office, charge him or his sureties with any burden which private individuals might see fit to agree among them-

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selves to cast upon him. Nor did his sureties, by their signatures to the bond of their principal, sanction on his part, or assume on their own, any such obligation.

The authorities cited for defendants, as well as reasons the most obvious, fully sustain the action of the trial court, and the judgment is affirmed. All concur.

NOENINGER, *Appellant*, v. VOGT.

1. **Slander : ACTIONABLE WORDS.** Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable.
2. ——— : ———. A general charge against one that he is a murderer is actionable.
3. ——— : ALLEGATA AND PROBATA. In an action for slander, the words proved must substantially correspond with those charged in the petition.
4. ——— : ——— : IMMATERIAL VARIANCE. If the words charged to have been spoken are proved, but with the omission or addition of others not varying the sense, the variance is immaterial.
5. ——— : ——— : EQUIVALENT WORDS INSUFFICIENT. It is not sufficient, however, that the words proved are of equivalent meaning with those charged. They must be substantially the same words charged in the petition.
6. ——— : ——— : ———. The rule last stated must of necessity apply to the words in the vernacular in which they are uttered. If the proof shows that words alleged to have been spoken in a foreign language are correctly translated in the petition, it is no ground for a demurrer to the evidence that they are also translated by the witnesses by the use of equivalent words and expressions.
7. **Foreign Words : QUESTION OF FACT.** The meaning of the words charged to have been spoken in a foreign language is a question of fact, to be proved by those conversant with both languages.
8. **Demurrer to Evidence : PRACTICE.** A demurrer to the evidence

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admits every fact which any of the evidence tends to prove and also every fact that the jurors may with propriety infer from the evidence before them. It should be allowed only when the evidence thus considered wholly fails to make proof of some essential averment.

3. ——— : ———. Where the evidence tends to support one of the two counts of the petition, the demurrer to the evidence should be overruled.
10. **Slander: WORDS IMPUTING DISHONESTY IN BUSINESS: SPECIAL DAMAGES.** Language which imputes to one fraud or want of integrity in his business is actionable *per se* and special damages need not be alleged.
11. ——— : ——— : **LOSS OF BUSINESS.** In such case a general diminution or loss of business may be proved; certainly so, where there is a general allegation to that effect in the petition.
12. ——— : ——— : ———. It is not necessary to name particular customers who have ceased to do business with the plaintiff.
13. ——— : ——— : ———. The plaintiff should not only be allowed to show loss of business, but should also be permitted by his evidence to trace that loss, if he can to the alleged slander.
14. ——— : ——— : **REPETITION OF SLANDEROUS WORDS.** Plaintiff may also show a repetition by the defendant of the slanderous words, to prove malice in fact, and this may be done, it seems, although the repetition was made after commencement of suit.

Appeal from Cape Girardeau Circuit Court.—HON.
J. D. FOSTER, Judge.

REVERSED.

Oliver & Limbaugh for appellant.

(1) A charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable. *Rammel v. Otis*, 60 Mo. 365. (2) The words charged in these two counts are actionable *per se*. *Cooley on Torts*, 192 and 202 [1 Ed.] and cases cited; *Burtch v. Nickerson*, 17 Johns. 217; *Brooker v. Coffin*, 5 Johns. 188; 2 *Wheaton's Selwin*, 1272 and 1273; *Townsend on*

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Libel and Slander [3 Ed.] sec. 192, and cases cited. And in such cases the law infers malice. *Hall v. Adkins*, 59 Mo. 144; *Price v. Whiteley*, 50 Mo. 439; *Pennington v. Meeks*, 46 Mo. 217; *Weaver v. Hendrick*, 30 Mo. 502; *Lewis v. Few*, 5 Johns. 1. (3) The court erred in sustaining the demurrer to the evidence. *Wilson v. Bd. of Education*, 63 Mo. 137; *Frick v. Railroad*, 75 Mo. 595; *Buesching v. Gaslight Co.*, 73 Mo. 219; *Cook v. Railroad*, 63 Mo. 397.

Wilson Cramer and *R. H. Whitelaw* for respondent.

BLACK, J.—This is an action of slander in three counts. The slanderous words were spoken, in the German language, to, and in the hearing of the plaintiff, and in the hearing of other persons, all of whom understood their meaning. The petition sets out the offensive words in the language in which they were uttered and also gives a translation of them. At the close of the plaintiff's case, the court sustained a motion for judgment for the defendant, "on the ground that the evidence failed to sustain the averments of the petition. The respondent has filed no brief and all we have to indicate his position is the motion itself.

The charge of the first count, as the words are translated, is "You are a defrauder; all that you have you accumulated by defrauding," intending thereby to charge plaintiff with cheating and defrauding in his business of a merchant and miller. It is also alleged that the plaintiff was engaged in those occupations, and that the words were uttered of him in his said business. The defamatory words of the third count, as translated, are: "You are an incendiary and a murderer." Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable. *Rammell v.*

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Otis, 60 Mo. 335. That these words of the first count do charge the plaintiff with fraud and dishonesty in his business cannot be questioned, and the evidence tends to show that they were spoken of the plaintiff in his occupation of a merchant and miller. A general charge of being a murderer is actionable. Townshend on Lib. and Slan., sec. 168; Odgers on Lib. and Slan. [Bigelow] 65, 121. See also *Anthony v. Stephens*, 1 Mo. 254. It follows that the words of both of these counts are actionable.

The words as alleged in the German are proved with scarcely any variance, but there is some variance in the translation as made by the witnesses, and especially is this so, as to the word, "Mordbrenner," in the third count. The witnesses generally use expressions of similar import; one translates the words of both counts exactly as stated in the petition. (The slander proved must substantially correspond with that charged.) This rule, it has been repeatedly held by this court, means that if the words charged to have been spoken are proved, but with the omission or addition of others, not varying the sense, then the variance is immaterial. It is not enough, however, that the words proved are of equivalent meaning; they must be substantially the same words laid in the petition. *Berry v. Dryden*, 7 Mo. 324; *Birch v. Benton*, 26 Mo. 153; *Street v. Bushnell*, 24 Mo. 329; *Pennington v. Meeks*, 46 Mo. 217; *Bundy v. Hart*, *Id.* 466. The rule just stated must of necessity apply to the words in the vernacular in which they are uttered. If the proof shows that the words are correctly translated in the petition, it is no ground for demurrer to the evidence that they may be or are, by the witnesses, also translated by the use of equivalent words and expressions. The meaning of the foreign words is a question of fact, to be proved like any other fact. This will, of course, be done by those conversant with both languages.

Again a demurrer to the evidence admits every fact which any of the evidence tends to prove, and also every

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fact which the jurors might with propriety infer from the evidence before them. It should be allowed only when the evidence, thus considered, wholly fails to make proof of some essential averment. *Wilson v. Board of Education*, 63 Mo. 149; *Kelley v. Railroad*, 70 Mo. 609; *Frick v. Railroad*, 75 Mo. 601. Here there was evidence tending to support both of these counts, and if there had been evidence tending to support one only, still the demurrer should not have been given and the defendant should have been put to proof on that count. In no view of the case can the action of the court be sustained. We do not understand the second count to be relied upon and hence it is not considered.

Language which imputes to one fraud, or want of integrity in his business, is actionable, *per se*, and hence special damages need not be alleged. *Towns. on Lib. and Slan.* sec. 192; *Odgers Ib.* [Bigelow's Ed.] 308; *Cooley on Torts*, 196. In such cases a general diminution or loss of business may be proved, certainly so, where there is a general allegation to that effect in the petition, as is the case here. It is not necessary to name particular customers who have ceased to do business with the plaintiff. *Odgers*, 317 and 318; *Townshend*, section 345. The plaintiff should not only be allowed to show loss of business, but he should also be allowed by his evidence to trace that loss, if he can, to the alleged slander. He may also show a repetition by the defendant of the slanderous words, to prove malice in fact. This was allowed at an early day in this state, though the repetition was made after suit commenced. *Williams v. Harrison*, 3 Mo. 412. The judgment is reversed and the cause remanded. All concur.

Kellogg Newspaper Company v. Farrell.

A. N. KELLOGG NEWSPAPER COMPANY, *Plaintiff in Error*, v. FARRELL *et al.*

1. **Partnership.** A mere participation in the profits and loss does not necessarily constitute a partnership between the parties so participating.
2. ———. Whether the relation of partnership exists depends largely on the intention of the parties.
3. ———. A contract construed and held not to constitute the parties thereto partners.

Error to Pike Circuit Court.—HON. ELIJAH ROBINSON, Judge.

AFFIRMED.

Smith & Krauthoff and *E. T. Smith* for plaintiff in error.

(1) The definition of a partnership contained in the instructions given for the defendant and by the court of its own motion, is erroneous as applied to the facts of this case. The cases of *Donnell v. Harshe*, 67 Mo. 170, and *Musser v. Brink*, 68 Mo. 242, were all cases of partnership *inter sese* and not, as in the case at bar, one of such a relation as to third persons, or by operation of law. (2) The power to sell the partnership property is not the conclusive test of the existence or non-existence of the partnership relation. Story on Part. [7 Ed.] sections 53, 54, 55. (3) Persons engaged in any trade, business or adventure upon the terms of sharing the profits and losses arising therefrom are partners therein. 1 Lindley's Part. [Ewell's Ed.] section 18. And an agreement to share the net profits necessarily implies a sharing of the losses, within the rule. *Wilcox v. Dodge*, 12 Ill. App. 517; 1 Lindley's Part.; *Pooley v. Driver*, 5 Ch. Div. 458;

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Hankey v. Becht, 25 Minn. 212; *McCrary v. Slaughter*, 53 Ala. 230; *Pratt v. Langton*, 12 Allen, 544; *Bingham v. Clark*, 100 Mass. 430; *Pettee v. Appleton*, 114 Mass. 114; *Parker v. Canfield*, 37 Conn. 250; *Eastman v. Clark*, 53 N. H. 276.

John W. Buchanan for defendant in error.

(1) The court committed no error in passing on the instructions. Those given for the plaintiff told the jury to find against Farrell if he and Lindenberger were partners, and that given by the court of its own motion contained a correct definition of a co-partnership. *Ashley v. Shaw*, 82 Mo. 76; *Musser v. Brink*, 68 Mo. 242; *Donnell v. Harshe*, 67 Mo. 170, and cases there cited. (2) The agreement that Farrell was to have one-half of the net proceeds of the paper did not constitute him a partner. This was to be his compensation for the use of his newspaper office, fixtures, etc. *Gill v. Ferris*, 82 Mo. 156; *Campbell v. Dent*, 54 Mo. 325; *Wiggins v. Graham*, 51 Mo. 17. (3) The court might very properly have instructed the jury that under the evidence in the case they were not partners. The intention of the parties to be or not to be partners is to govern in all cases, except where they have held themselves out to third persons as partners. *Campbell v. Dent*, 54 Mo. 325; Story on Part. [6 Ed.] 49. (4) There was never any pretense that Farrell had held himself out to plaintiff as a partner, or that plaintiff had any reason to believe he was a partner when the goods in question were sold. Plaintiff undertook to hold him as an actual partner, and not as a *quasi* partner, and hence the same definition is applicable whether the question be between Farrell and Lindenberger, or between Farrell and plaintiff.

NORTON, J.—Defendant, Farrell, entered into the following agreement with his co-defendant, Lindenberger. viz :

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"This agreement made and entered into this sixth day of February, 1882, between John Farrell, of the first part, and C. Lindenberger, of the second part, witnesseth that the party of the first part this day turns over to the party of the second part the 'Post-Observer' newspaper, to be by the party of the second part conducted in every respect as if he were the owner thereof. The party of the second part agrees to conduct the business in his own name, to pay all expenses attending the running thereof and to pay one-half the net proceeds of the concern to the party of the first part, quarterly. The party of the first part reserves the right to indicate the general and political policy of the paper, and also at any time to dispose of a one-half interest in the same. In case of such sale the said party of the first part agrees to lease to the party of the second part the remaining half at the rate of \$150.00 per annum. This agreement to be for one year from the date hereof, provided, the stipulations herein contained are complied with, otherwise the agreement to be void and cease at the instance of the party aggrieved.

"Witness our hands and seals this sixth day of February, 1882.

"JOHN FARRELL. [SEAL.]

"C. LINDENBERGER. [SEAL.]"

It appears from the record that plaintiff sold to defendant, Lindenberger, certain materials to be used in conducting the newspaper mentioned in the above agreement, and seeks in this suit to make defendant, Farrell, liable for its payment on the ground that said agreement constituted a partnership as between Farrell and Lindenberger. The trial court, by refusing declarations of law asked by plaintiff in substance, that in law said agreement made defendants partners, in effect held that said agreement did not in fact constitute a partnership between defendants.

The only material question, therefore, to be deter-

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mined on the writ of error prosecuted by plaintiff is whether this ruling of the trial court is right or wrong. Construing the agreement in the light of what is said by this court in the cases of *Musser v. Brink*, 68 Mo. 242; *Donnell v. Harshe*, 67 Mo. 173; *Philips v. Samuel*, 76 Mo. 658; *Ashby v. Shaw*, 82 Mo. 76; *McDonald v. Matney*, 82 Mo. 358, we must arrive at the same conclusion reached by the trial judge.

In the case last cited it is said: "That a mere participation in profits and loss does not necessarily constitute a partnership between the parties so participating. * * * It is a question of intention. * * * Each case must be determined upon its own peculiar facts." In seeking for the intention of the parties, the whole instrument must be looked to, and viewing the agreement in question in its entirety, it is apparent, we think, that it was not the intention of Farrell and Lindemberger to form a partnership between themselves, for it is expressly stated that Farrell turned over to Lindemberger the Post-Observer newspaper, not to be conducted by them jointly as partners, but, on the contrary, to be conducted by him in every respect as if he were the owner thereof, and that he should conduct the business in his own name and pay all the expenses attending the running thereof. These expressions negative any intention of the parties to form a partnership. The reservation of the right to control the political course of the paper gave Farrell no control over its business affairs. In the light of these expressions, and construing the contract as an entirety, we regard the agreement to pay Farrell one-half of the net proceeds as simply measuring the compensation he was to receive for the use of the property turned over to Lindemberger, and not as giving him a right to participate in the profits, as profits of the business.

As on the record the court would have been justified in instructing the jury that plaintiff could not recover,

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we deem it unnecessary to consider the instructions either given or refused, and as the judgment is for the right party, it is hereby affirmed. All concur.

FREDERICK V. ALLGAIER *et al.*, Appellants.

1. **Practice in Supreme Court.** The Supreme Court will not disturb a verdict on the issue of the *bona fides* of a sale of personal property where the evidence thereon is conflicting.
2. **Evidence.** Evidence having no bearing on the question at issue should not be admitted.
3. **Sale: FRAUD ON CREDITORS.** A sale of goods is invalid as against creditors where the vendor makes the sale with the intent to hinder, delay or defraud them and the vendee at the time of his purchase knew of such intent of the vendor. And where two instructions were given, one declaring that knowledge of the plaintiff, at the time of the purchase, of the intent of the party from whom he bought to hinder, delay or defraud his creditors, would render the sale void; and the other declaring that the plaintiff ought to recover unless he bought the goods with the intent to hinder, delay or defraud the creditor of the vendor of the goods, it was held that such instructions were so plainly repugnant as to render it impossible to tell which the jury took for their guidance, and, therefore, caused their verdict to be mere guess-work, and that such error was fatal.
4. **Fraudulent Intent: EVIDENCE.** A fraudulent intent on the part either of the seller or purchaser need not be proved by direct and positive evidence, but it may be shown from facts and circumstances attending the transaction.
5. **Allegata and Probata.** While the evidence must correspond with the *allegata*, yet only the substance of the issue need be proved.

Appeal from Clinton Circuit Court.—HON. GEO. W.
DUNN, Judge.

REVERSED.

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Thos. E. Turney and Lancaster, Thomas & Lucy
for appellants.

(1) The questions asked plaintiff on cross-examination in reference to the Ulbright and other mortgages were competent, and the court erred in sustaining the plaintiff's objections thereto, and excluding the same. *Eastman v. Premo*, 49 Vt. 355; 1 Greenl's Evid., sec. 53; *Castle v. Bullard*, 23 How. 172; *Irving v. Matley*, 7 Bing. 543; *Carey v. Heath*, 1 Hill, 316; *Wood v. U. S.*, 16 Pet. 360; *Bottomly v. U. S.*, 1 Story, 144; *Buckley v. U. S.*, 4 How. 259; *Taylor v. U. S.*, 3 How. 209. (2) Whether the facts were admissible as independent evidence or not, the questions were certainly competent on cross-examination of the plaintiff, the party charged with the fraud. Whart. on Evid., secs. 547 and 548; *Young v. Smith*, 25 Mo. 341. (3) Where a vendor sells property with the intent to hinder, delay or defraud his creditors, and the vendee purchases, because he is getting a good bargain and for the sole purpose of making money by the transaction, and without any intention of aiding or assisting the vendor in hindering, delaying or defrauding his creditors, but with knowledge of the vendor's intent to hinder, delay or defraud his creditors, such sale is fraudulent and void as to the vendor's creditors, notwithstanding the vendee paid full value for the property, and such property is subject to attachment and execution against the vendor. *Arnholt v. Hartwig*, 73 Mo. 485; *State ex rel. Peirer v. Merritt*, 70 Mo. 284; *Dougherty v. Cooper*, 77 Mo. 528; *Rupe v. Alkirr*, 77 Mo. 641; *Bartles v. Gibson*, 17 Fed. Rep. 293; Bump on Fraud. Con., 201, 202 and 494. (4) Instructions complete in themselves and purporting to cover the entire case, but which ignore one important element in the case, are not, and cannot be cured by others which do not ignore that element. *Goetz v. Railroad Co.*, 50 Mo. 472; *Porter v. Harrison*, 50 Mo. 516; *Rayston v.*

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Trumbo, 52 Mo. 35; *State v. Mitchell*, 64 Mo. 191; *Thomas v. Babb*, 45 Mo. 384. It is error to instruct the jury that "unless they are satisfied," etc., it should be unless they believe, etc. (5) Fraud need not be proved by direct or positive testimony, but may be shown by the facts and circumstances surrounding and attending the transaction, and where those facts and circumstances taken together show the existence of fraud, and are unexplained, the denial of a fraudulent intent and the assertion of good faith by the party implicated, is not sufficient to rebut the proof of fraud furnished by the facts and circumstances. *Kehr v. Sichler*, 48 Mo. 96; *Cooley on Torts*, 475; *Bump on Fraud. Con.*, 600 to 606; *Murrey v. Young*, 73 Mo. 273, and authorities there cited. (6) If a vendor sells his property for the purpose of putting it out of the reach of his creditors, so that he may be able to settle with his creditors for less than he owes them, and less than the amount realized by him from the sale of his property, such sale is made with intent to defraud creditors. *Bump on Fraud. Con.*, 19 and 20 [3 Ed. 1882]; *State, etc., v. Benairt*, 37 Mo. 500; R. S., 1879, sec. 2497. (7) If the vendor sells with intent to hinder, delay or defraud his creditors, and the vendee purchases with no intent to aid or assist the vendor in carrying out his intent, and with no knowledge of the vendor's intent, but with knowledge of facts sufficient to put a prudent man upon inquiry as to the vendor's motive in making the sale, such sale is fraudulent and void as to the creditors of the vendor, and the property cannot be held by the vendee against the creditors of the vendor. *Bump on Fraud. Con.*, 201 and 494 [3 Ed. 1882]; *The State ex rel. Peirer v. Merrill*, 70 Mo. 284; *Rupe v. Alkirk*, 77 Mo. 643, and authorities there cited; *Bartles v. Gibson*, 17 Fed. Rep. 297; *Atwood v. Impson*, 20 N. J. Eq. 156; *Baker v. Bliss*, 39 N. Y. 70; *Avery v. Joharrn*, 27 Wis. 251; *Davis v. Brickard*, 53 Wis. 492.

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J. F. Harwood and Ramey & Brown for respondents.

(1) Plaintiff's instructions correctly submitted to the jury the issue tendered in defendants' answer. *Bank v. Murdoch*, 62 Mo. 70; *Hasell v. Rust*, 64 Mo. 325. When instructions taken as a whole are not calculated to mislead, it is sufficient. *Noble v. Blount*, 77 Mo. 235. (2) If plaintiff bought the goods *bona fide* and without any knowledge of Rhodes' intention, and without any intention of defrauding Rhodes' creditors, or to aid or assist him to hinder, delay or defraud his creditors, the sale was valid as to plaintiff. *Gates v. Labeaume*, 19 Mo. 17; *Dougherty v. Cooper*, 77 Mo. 528; *Hurley v. Taylor*, 78 Mo. 238. (3) There was no evidence that plaintiff knew Rhodes was indebted and for that reason plaintiff's instruction, number 4 1-2, was properly refused. *Flori v. St. Louis*, 3 Mo. App. 231; *Schlingmann v. Fielder*, 3 Mo. App. 577; *Utley v. Tolfree*, 77 Mo. 307. A party purchasing personal property is not required to inquire into the motives of the vendor in making the sale. *State v. Merritt*, 70 Mo. 275. (4) The mortgages offered in evidence were rightly ruled out by the court. They were not relevant. *Eddy v. Baldwin*, 32 Mo. 369; *Greene v. Gallagher*, 35 Mo. 226; *Coal v. Railroad*, 60 Mo. 227; *State v. Martin*, 74 Mo. 547.

SHERWOOD, J.—Action for the recovery of a sum of money for the seizure and conversion of a portion of a stock of goods levied on by defendants under a writ of attachment and claimed by plaintiff to have belonged to him.

I. The evidence introduced was on the point of the *bona fides* of the sale of goods made by Rhodes, the then owner, to plaintiff. On this point there was evidence

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pro and *con*, and the result was a verdict for plaintiff. Considering the mere question of evidence adduced at the trial, if the verdict had gone either way there would be no ground for any interference.

II. On the point of the admissibility of evidence there was no error. The mortgages on personal property offered in evidence made by third parties to plaintiff, during the years 1874 to 1881, had no sort of bearing as to the *quo animo* of the transaction then being litigated, and were, therefore, wholly inadmissible. This rule is announced in *Hubble v. Vaughan*, 42 Mo. 138, and is decisive here. To the same effect is *Gutzweiler, Adm'r, v. Lackmann*, 39 Mo. 91.

III. The fifth instruction given at the instance of plaintiff was as follows:

"The jury are instructed that although they may believe from the evidence that said Wm. Rhodes sold the goods mentioned in the evidence to plaintiff for the purpose and with the intent to hinder, delay and defraud his creditors, and that said sale and delivery of said goods did in fact hinder, delay and defraud the creditors of said Rhodes, yet they will find for the plaintiff unless plaintiff bought and took possession of said goods with the intent, or for the purpose of hindering and delaying or defrauding the said creditors."

And the fourth instruction given by the court of its own motion was in these words:

"The jury are instructed that a fraudulent intent either in seller or purchaser, need not be proven by direct and positive proof, but may be proved by facts and circumstances surrounding the transaction. If, therefore, the jury believe from all the facts and circumstances detailed in evidence that the said Rhodes made the sale to plaintiff with the intent to hinder, delay or defraud his creditors, and that the

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plaintiff at the time of his purchase knew of such intent on the part of Rhodes they must find for the defendants."

It will be readily seen that these instructions, when thus placed in juxtaposition, were plainly inharmonious, the one requiring a verdict for the plaintiff unless he "bought and took possession of the goods with the intent or for the purpose of hindering and delaying or defrauding the said creditors," the other requiring a verdict for the defendant if "Rhodes made the sale to plaintiff with the intent to hinder," etc., and "the plaintiff at the time of his purchase knew of such intent," etc. In the one instance *mere knowledge* on the part of plaintiff of Rhodes' fraudulent intent is sufficient to defeat his action, in the other he must have been a participant in that fraudulent intent in order to defeat his recovery. These instructions are clearly irreconcilable and cannot stand together. It is impossible to tell which one the jury took for their guidance; if they took the fifth they must have ignored the fourth, and if they took them both together their verdict could not have been anything else than *guess work*. This is not a case where, as sometimes happens, one instruction supplies an omission in another, but a case where elements are combined in one instruction totally repugnant to those contained in another given at the same time.

The fourth instruction was the proper one to give, and the fifth one for the plaintiff should have been refused, the doctrine contained in the latter instruction being only applicable to a creditor who buys from an embarrassed debtor, and not to a mere purchaser from such an one. This distinction is clearly pointed out in *Shelley v. Boothe*, 73 Mo. 74. And the same view as to knowledge of the purchaser of the intent being sufficient is reiterated in *Dougherty v. Cooper*, 77 Mo. 528.

IV. It is claimed that the fifth instruction for the plaintiff already commented on was correct because it

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conforms to the issue raised by defendants' answer, that the sale of the goods was made by "Rhodes to the plaintiff for the purpose and with the intent, as well on the part of the plaintiff as of said Rhodes, to hinder, delay or defraud the creditors of said Rhodes." This view is altogether unwarranted, and for this reason: Although it is a fundamental rule of evidence, that the evidence must correspond with the allegation, yet it is equally fundamental that it is sufficient if the substance of the issue be proved. The substance of the issue in the case at bar was whether the plaintiff bought with knowledge, etc. The fact that the answer was drawn too broadly did not require that defendants should be required to offer proof, or to submit to instructions as broad as the allegations of the answer.

For the errors already mentioned the judgment is reversed and the cause remanded. All concur.

THE STATE V. BAYNE, *Appellant*.

1. **Pleading, Criminal: INDICTMENT: FALSE PRETENSES.** An indictment under Revised Statutes, section 1561, for obtaining money by means of a false and fraudulent representation, which follows the form prescribed by that section, is sufficient.
2. **False Pretenses: EVIDENCE.** The evidence in this case held sufficient to go to the jury and to justify the court in overruling defendant's demurrer thereto.
3. **Practice, Criminal: FALSE PRETENSES: EVIDENCE: INTENT.** In a prosecution under Revised Statutes, section 1561, for obtaining money by means of a false and fraudulent representation, acts of the defendant similar to the one for which he is being tried, committed near the same time and in the same city, are admissible against him for the purpose of showing the intent with which the act charged was done. (Affirming *State v. Myers*, 82 Mo. 558).

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4. **Practice in Supreme Court : EXCEPTIONS : INSTRUCTIONS.** Where no exceptions are saved at the time to the action of the court in refusing instructions, they will not be considered in the appellate court.
5. **A series of instructions** upon the law of obtaining money by means of false and fraudulent representations examined and approved.

Appeal from Jackson Criminal Court.—HON. H. P.
WHITE, Judge.

AFFIRMED.

M. A. Fyke and Burris & Goldsby for appellant.

(1) The motion to quash should have been sustained. It was necessary to allege and prove that the money was obtained with intent to cheat and defraud. R. S., sec. 1561; *State v. Fancher*, 71 Mo. 460. (2) Defendant's demurrer to the evidence should have been sustained. There is nothing whatever in the evidence to show that defendant intended to cheat or defraud the witness, neither is there any trick or other thing developed by the testimony which constitutes any offence whatever under section 1561. *Rainey v. People*, 22 N. Y. 413. (3) The court erred in admitting the evidence of Gen. P. Frost. (4) The first instruction given by the court is clearly wrong, and the second and third are erroneous in that they seem to cast the burden of proving the good faith of the transaction upon defendant. The ninth is a comment upon the evidence. (5) The court erred in refusing defendant's instructions. The proposition of law contained in the first instruction asked by defendant, and refused, has met with the sanction of this court in many cases. *State v. Verbach*, 66 Mo. 163; *State v. Chunn*, 19 Mo. 233; *State v. Evans*, 49 Mo. 542.

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B. G. Boone, Attorney General, for the state.

The indictment follows the form prescribed by the statute (section 1561) and is sufficient. *State v. Simmons*, 12 Mo. 263; *State v. Rigan*, 22 Mo. 459; *State v. Schienneman*, 64 Mo. 386; *State v. Chumley*, 67 Mo. 41; *State v. Fancher*, 71 Mo. 460; *State v. Porter*, 75 Mo. 171. It was not necessary to charge that the offence was committed with intent to cheat and defraud Brooker. *State v. Scott*, 48 Mo. 422; *State v. Smallwood*, 68 Mo. 192; *Morton v. People*, 47 Ill. 468. The testimony of the witness, Frost, for the state, as to similar acts of defendant, was competent for the purpose of showing the intent with which the act charged was done. *Com. v. Turner*, 3 Met. 19; *State v. Meyers*, 82 Mo. 558, and cases cited. No error was committed in giving and refusing instructions.

NORTON, J.—This indictment is framed on section 1561, Revised Statutes, and follows the form prescribed in said section and is sufficient, under the rulings of this court, in the cases of *State v. Fancher*, 71 Mo. 460; *State v. Connelly*, 73 Mo. 235, and *State v. Norton*, 76 Mo. 180.

At the close of the evidence on the part of the state, defendant asked an instruction in the nature of a demurrer to the evidence, which was overruled, and this action of the court is assigned as error.

The disposition of this question involves a consideration of the evidence, which is substantially as follows:

Brooker, whose money was alleged to have been obtained by defendant, testified and said: "I was hunting work when I saw a card advertising for parties wanting employment, and obtained the address of J. W. Bayne, Adams House, Kansas City, as the party advertising. I came to Kansas City, saw Bayne in August, 1885, at the

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Adams House, where he agreed to give me thirty-five dollars per month and expenses to travel for him and teach others how to make pictures. He also agreed to show me how to make the pictures and furnish me an outfit. For this he charged me fifteen dollars. I paid him this amount, and he agreed to send me out the next night, and after several days he gave me sixty-five cents to pay my way to Liberty, Mo. I went to Liberty and staid one day. He promised to have the outfit there for me inside of three days. I stayed there until my money gave out, and then came back to Kansas City, where I met Bayne on the street. When he met me he said, 'Hello, you snoozer, are you back again?' I told him I was out of money, and he paid for my breakfast and bed, and said he would send me out the next night. I staid until the next night, and as nothing was done I went to see an officer, and told him about the matter and then went back to see Bayne and asked him when he was going to send me out. He said he would send me out as soon as he got ready. The fifteen dollars was for teaching me how to make pictures, and for furnishing me with a job. He was to procure an outfit from St. Louis in a few days. Bayne said he was traveling for J. C. Somerville, of St. Louis. The arrangement was that I was to travel from town to town and teach others how to make the pictures as Bayne had taught me. I was to charge thirty dollars for my instructions, fifteen dollars of which I was in each case to send to Bayne. The fifteen dollars I gave Bayne was all the money I had. After I had paid Bayne, he kept me coming day after day for several days, and finally gave me sixty-five cents, with which I paid my way to Liberty, where he directed me to go."

On cross-examination, witness said: "The money I was to receive as a salary was to come out of what I earned. Bayne taught me how to make or enlarge pictures, as he agreed to. I felt that I was qualified to go

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out and teach others, as Bayne had taught me. I am not able to say that the instructions I received from Bayne are of no value."

Frost, another witness for the state, testified to the same effect as to Bayne having obtained fifteen dollars from him in the same way he obtained the money from Brooker.

J. C. Somerville, of St. Louis, whom Bayne claimed to represent, testified that he did not know defendant; that he never had been his agent, nor had he ever received any orders for supplies from Bayne.

Officer Snow, who arrested Bayne, testified as to the statements made by Brooker and Frost to him prior to Bayne's arrest, and that he saw Bayne, who promised to refund the money he had obtained from the complainants. On his failure to do so the officer went again to arrest him; found he had gone, and apprehended him at the Union depot, in Kansas City, where he was dodging around the cars and attempting to evade the officer.

If the statute on which the indictment is founded were like the New York statute, which makes it an offence to obtain money or property by mock auctions, or "*by any other gross fraud or cheat at common law*," the case of *Ranney v. People*, 22 N. Y. 414, to which we have been cited, would apply, and the evidence above detailed would not support the indictment. But our statute is widely different and much more comprehensive in its scope. It provides that, "Every person who, with intent to cheat and defraud, shall obtain, or attempt to obtain, from any other person, or persons, any money, property, or valuable thing whatever, * * * by use of any trick or deception, or false and fraudulent representation or statement, or pretense, or by any other means, or instrument or device, commonly called the confidence game, or by means or by use of any false or

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bogus check, or by any written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony," etc.

If the offence defined by the statute had been limited to obtaining money by a false pretense, the case of the *State v. Vorback*, 66 Mo. 168, cited by counsel, would apply and have justified the court in giving the instruction asked. But it is not so limited, for under the statute, obtaining money from another with the intention of cheating and defrauding "by use of any trick or deception, or false and fraudulent representation," is made a felony. The evidence above detailed tends strongly to show that the money was obtained by defendant from Brooker by the false and fraudulent representation that he was the agent of J. C. Somerville, of St. Louis, and as such, authorized to furnish Brooker with an outfit to enable him to enter in the business on which defendant was to send him. Somerville testified that this representation was false, and that he did not know the defendant. The demurrer to the evidence was properly overruled.

An objection was also made to the evidence of witness Frost, who was allowed to testify that defendant had obtained money of him in about the same manner he had obtained it of Brooker, and near the same time, in the same town or city. In the case of *State v. Myers*, 82 Mo. 558, while the correctness of the general rule (announced in 76 Mo. 351, and 70 Mo. 289), that a distinct crime for which the party might be separately proceeded against, cannot be given in evidence against the prisoner on trial for a single or separate offence, was fully and distinctly recognized, it was expressly held that the rule was not of universal application, but had exceptions, and that in a prosecution founded on said section 1561, Revised Statutes, it was competent for the purpose

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of showing the intent with which the act charged was done, to prove similar acts of the defendant done in the same town, about the same time, though at a different time. The authorities referred to in the opinion seem fully to sustain the proposition laid down, and under the ruling in that case, the evidence of Frost was properly received to be considered as the court instructed the jury, only for the purpose of determining the intent with which the act in question was done.

The court gave nine instructions, all of which were excepted to, and refused two asked by the defendant. No exceptions having been taken at the time to the action of the court in refusing the instructions asked by defendant, they will not, for that reason, be considered. Those that were given presented the law of the case fairly to the jury, four of which were as follows :

"1. If you shall believe and find, from the evidence, that at any time within three years next before the first day of September, 1885, at the county of Jackson, state of Missouri, the defendant, intending to cheat and defraud, obtained from the witness, F. Brooker, any amount of money of any value whatever, the same being the money and the property of the said Brooker, by means of a cheat or a fraud, or a trick or deception, or a false or fraudulent representation or statement, or a false pretense or confidence game, you will find the defendant guilty as charged."

"2. If you shall find and believe that the only money given to the defendant by the witness, Brooker, was in payment for instructions which he had received in the art of preparing or changing in appearance pictures or photographs, you will find him not guilty."

"3. If you shall find and believe, from the evidence, that the transaction had between defendant and Brooker was had and entered into in good faith or with an honest intent on the part of the defendant, you will find him not guilty."

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"4. In determining what was the intent of the defendant in obtaining money from the witness, Brooker, provided you find that he did receive any money from such witness, and in determining whether the defendant acted in good faith and with an honest intent in contracting with the witness Brooker, provided you find that he did so contract, you should take into account all the facts and circumstances proven before you."

The fifth, sixth, seventh and eighth instructions are omitted, as no point was made on them, and as they relate in approved form to reasonable doubt, and the rules governing the jury as to credibility of witnesses and in weighing the evidence.

The ninth instruction is as follows:

"9. The testimony introduced before you relative to transactions between the defendant and persons other than the witness Brooker, you should take it into account and give it such weight as you deem proper in determining the intent of the defendant, and his good faith or honesty of purpose in any transaction you may believe he had with said Brooker, but, although you may believe that the defendant behaved dishonestly with such other persons, you cannot convict him unless you shall also further believe and find that he obtained money from said Brooker in a manner such as to constitute crime according to number one of these instructions."

Perceiving no well grounded objection to the instructions given, and finding no error in the record justifying an interference with the judgment, it is hereby affirmed, All concur.

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THE CITY OF ST. LOUIS, *Appellant*, v. PRIEST *et al.*

1. **Trust Deed : DELEGATION OF POWER OF TRUSTEE.** A trustee in a deed of trust cannot delegate the trust or power of sale to a third person, unless expressly authorized to do so by the deed, and a sale made by such delegated agent, when unauthorized by the deed, is void.
2. **Equity : MISTAKE OF LAW.** Equity will not afford relief against a mere mistake of law, unmixed with any mistake of fact.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Leverett Bell for appellant.

In *Martin v. Halley*, 61 Mo. 196, it was held that equity will interpose for the relief of one who has taken a defective conveyance, and will compel the vendor and those claiming under him to make good the conveyance. For the purposes of this case, the defendants, as to the property involved, are the vendors of the plaintiff. The defect in the trustee's deed is a defect in the deed of plaintiff's vendors. 1 Story's Eq. Jur. [10 Ed.] secs. 169, 170. Under section 3236 of the General Statutes, Anderson is not entitled to invoke the statute of limitations, and not being so entitled, it cannot be invoked jointly by him and his co-defendant, Priest.

W. H. Clopton for respondents.

(1) The statute of limitation bars any right of action. The suit is not brought under the statute (R. S., p. 608, sec. 3562), to quiet title, but is one to divest title. The pretended sale was made in 1865. (2) Equity will not relieve against the consequences of a mistake of law.

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1 Story's Eq. Jur., secs. 111, 114, 115, 120; *Hendrix v. Wright*, 50 Mo. 315. At the time that Hoyt created Budd his attorney in fact, lawyers might have thought that it was legal for a trustee to authorize another to act in his absence, but this court has since decided that such sales are void. *Spurlock v. Sproule*, 72 Mo. 503. In the case of *Whittelsy v. Sproule*, 39 Mo. 13, it was held (as early as 1863), that the estates and powers of a trustee could not be assigned by him without the consent of the parties, so as to clothe the assignee with power of sale. Ch. Kent, in *Lyon v. Richmond*, 2 Johns. Ch. 60, says: "And to suffer a subsequent judicial decision in any one given case on a point of law, to open or annul everything that has been done in other cases of the like kind for years before, under a different understanding of the law, would lead to the most mischievous consequences." *Bank v. Daniels*, 12 Peters, 33-56; *Hunt v. Rousmanier*, 1 Peters, 1-15.

NORTON, J.—The city of St. Louis, in 1859, was the owner in fee of certain real estate described in the three counts of the petition filed in this case, and in October of said year sold and conveyed said real estate to defendants. Defendants to secure the payment of the purchase money, executed a deed of trust conveying said real estate to one Hoyt, then comptroller of the city of St. Louis, and authorizing either him to sell and convey the property for the payment of the purchase money if default should be made in its payment, or any successor of his in office, who may be acting comptroller of the city of St. Louis at the time default in payment be made.

It appears that in 1864 Hoyt, the trustee, executed a power of attorney to George K. Budd, in which, after stating that default in payment of the notes secured by the deed had been made, it is recited that by reason of

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his absence from the city he could not execute the trust, authorized and empowered said Budd to execute it for him. It further appears that in 1865 said Budd, in pursuance of this delegated power, advertised the property for sale, at which sale the city became the purchaser and received a deed therefor, in which it is recited that: "Stephen Hoyt, formerly comptroller of the city of St. Louis, now of the city and parish of New Orleans, state of Louisiana, by his attorney, George K. Budd, * * * is the party of the first part." This deed is signed "Stephen G. Hoyt, by his attorney in fact, George K. Budd," and is acknowledged by said Budd.

Plaintiff's petition is based on the above state of facts and asks the court to divest defendants of title to the property thus sold and put it in the plaintiff. The trial court dismissed the bill and rendered judgment accordingly, and it is this judgment we are asked to reverse on plaintiff's appeal.

It is established law in this state that a trustee in a deed of trust cannot delegate the trust or power of sale to a third person unless expressly authorized to do so by the deed, and a sale made by such delegated agent is void. *Spurlock v. Sproule*, 72 Mo. 503; *Graham v. King*, 50 Mo. 22; *Landrum v. Bank*, 63 Mo. 51. The sale in this case having been made by Budd as the agent of Hoyt, is void, and the deed based on such sale is likewise void.

It is also well settled that equity will not afford relief against a mere mistake of law. 1 Story Eq., secs. 111-15; *Hendricks v. Wright*, 50 Mo. 315; *Hunt v. Rousmanier's adm'r*, 1 Peters, 15. In the present case the mistake made in the sale of the property was one of law unmixed with any mistake of fact, and giving effect to the principle of law above stated, the judgment of the circuit court in dismissing plaintiff's bill is affirmed. All concur.

The City of St. Louis v. Wiggins Ferry Company.

THE CITY OF ST. LOUIS v. WIGGINS FERRY COMPANY,
Appellant.

1. **Deed : PRESUMPTION : WAIVER.** A clause in a city ordinance, by authority of which a deed to the city for certain wharf premises was made, provided that the deed should be binding on the city as soon as the owners of fifteen hundred feet of the wharf should have executed the deed to the satisfaction of the mayor. *Held*, in ejectment by the city to recover the premises, (1) that in the absence of any evidence to the contrary, it must be presumed that the deed was delivered and signed by the prescribed number of property owners, and (2) that the city having entered upon the performance of the stipulations on its part contained in the deed, waived the stipulation in its favor in the ordinance.
2. **Estoppel.** An estoppel cannot be based upon a void judgment where neither the party setting up the estoppel, nor those under whom he claims, have lost or given up any rights or property by reason of such void judgment.
3. **Deed : COVENANT : CONDITION.** Whether words amount to a condition or covenant is a matter of construction, and the intention of the parties will control.
4. ———. A deed held not void for uncertainty in the description of the premises conveyed.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

R. H. Kern and Noble & Orrick for appellant.

(1) The agreement of January 28, 1853, is inoperative and of no force, because it was never perfected as contemplated and as required by its terms. (2) If, however, it is true that a less number than the whole could be bound by the agreement, then that number is certainly fixed to be holders of not less than fifteen hundred feet :

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and there is no evidence that such number signed the agreement. *Anderson v. City*, 47 Mo. 479. (3) The city here claims a specific lot or parcel of land exactly described by metes and bounds. No such property is described in the agreement, nor can it be ascertained by the only parts of plat "A" referred to in the contract. (4) The contract is void for uncertainty of description. (5) Even if the contract were properly executed by parties owning fifteen hundred feet, other express conditions thereof precedent to any title vesting in the city were not performed by it and ejectment cannot now be maintained thereon. (6) But even as a condition subsequent, the foregoing covenants were valid against the plaintiff, and the failure on the part of plaintiff to perform the condition, even as a condition subsequent, caused a forfeiture of the agreement. *Bank v. Drummond*, 5 Mass. 321; *Hubbard v. Hubbard*, 97 Mass. 191, 192. (7) Regarding the contract of 1853, from another point of view, we shall arrive at the same conclusion as above, as to the subject-matter; the contract relates not to the fee in the land, but to the easement merely, and the plaintiff does not now claim that the fee ever passed. Wash. on Easements, p. 29, sec. 3; *Portmore v. Brem*, 3 Dowling & R. 145. (8) The city abandoned and rescinded the contract and instituted condemnation proceedings against the parties of the first part, years before this action.

Leverett Bell for respondent.

BLACK, J.—This is an action of ejectment for that part of north wharf which lies between two adjacent streets in the city of St. Louis when produced to the river. The defendant is in possession under leases made to it in 1870 by Benoist, Page and Bogy. The city claims possession by virtue of a deed made in 1853, by some forty odd persons, including the defendant's lessors.

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These lessors are, therefore, the common source of title beyond which we need not inquire.

The substantial portions of the deed, so far as material to this case, are as follows: The first parties describe themselves as owners and part owners of real estate fronting on the west bank of the Mississippi river, from Cherry street to northern limits of the city; and for one dollar and the advantages to accrue to them from the improvement of the wharf, etc., convey to the city all their title to all lands lying eastwardly of the proposed western boundary line of the wharf as shown on a plat annexed to the deed. "*Provided*, also, that said city of St. Louis shall establish the wharf by ordinance in conformity with said plat 'A' (including the widening westwardly between Biddle and Florida streets), and shall also make provisions for opening the whole of said wharf at the earliest period consistent with the public interest, and the means of said city, before this contract shall be binding on the first parties or any of them;" and the said second party covenants with the said first parties "that one-half of the wharfage collected annually shall be expended on the wharf north of Cherry street," etc., the expenditures only to be made on those parts relinquished by the first parties, or to which the city shall otherwise acquire a right for wharf purposes. The city by the same deed relinquished to the first parties all of its title to all accretions west of the western boundary line of the proposed wharf.

1. A contention on the part of the appellant is that this deed never took effect, because the ordinance, by authority of which the deed was made, contains a clause to the effect that the agreement having reference to the deed shall be binding on the city as soon as the owners of fifteen hundred front feet of the wharf have executed the same to the satisfaction of the mayor. Although it was not shown on the trial of this cause that the deed

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had been signed by persons owning that number of front feet, still the deed was acknowledged by all of the parties thereto, and was put to record in January, 1854. In the absence of any evidence to the contrary, it must be presumed that the deed was delivered as well as signed by the prescribed number of property owners. Besides this presumption, the city entered upon the performance of the agreements contained in the deed shortly after its date, and by so doing waived, as it had a right to do, this stipulation in its favor in the ordinance. It is, therefore, immaterial whether or not the persons who signed and delivered the deed represented fifteen hundred front feet.

2. Has the city complied with those provisions of the deed which are made conditions precedent? The evidence conduces to show that an ordinance was passed in 1853, establishing the line of the wharf from Biddle to Florida streets, which also directed the opening of the unopened portions thereof; and that this part of the wharf has long since been constructed, paved and put in general use. Besides the ordinance, under authority of which the deed was made, another one was passed and approved August 6, 1864, numbered 5403, which again established the wharf from Biddle street to the northern limits of the city. The proceedings had under this ordinance for the condemnation of property were approved in 1868, and a large appropriation was made to pay the benefits assessed against the city. Out of eleven thousand feet, the whole length of north wharf, over five thousand feet had been fully improved before this suit was commenced. A dyke had been constructed the whole length on the river line and the wharf filled in to the shore line except at the site of an elevator. From 1853 on, the city has expended upwards of \$300,000 on the improvement. This evidence shows a fair and full compliance on the part of the city with all the conditions

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precedent contained in the deed. It is not contemplated by the deed or ordinance, by authority of which it was made, that the city should make the whole improvement at the same time. The contrary is clearly indicated.

But it is shown that the condemnation proceedings had under ordinance 5403 failed from their inherent illegality, and to that end *Anderson v. St. Louis*, 47 Mo. 479, is made a part of the record. In these proceedings the city officers sought, it would seem, to condemn the property, including the very property which the city had acquired by the deed now in question, because of which it is claimed the city abandoned and forfeited all rights under the deed. No authority is cited or suggestion made which can lead to such a result. The proceedings were void, certainly so as to all property owners who did not in some way ratify them. We do not see how an estoppel can be based upon a void judgment, when, as here, neither the party setting up the estoppel nor those under whom he claims, have lost or given up any rights or property by reason of such void judgment. The party instituting such proceedings is not precluded from asserting their invalidity. *Mercier v. Chace*, 9 Allen, 242. Moreover the city officials had no power vested in them to abandon property acquired for, improved and used as a public highway.

3. It is, of course, not claimed that the further words used in the deed by which the city covenants to expend one-half of the wharfage annually collected on the north wharf created a condition precedent, but it is claimed that in effect they amount to a condition subsequent. Evidence that this stipulation had not been complied with was excluded, and of this ruling error is assigned. Whether words amount to a condition or covenant is matter of construction and the intention of the parties should control. 4 Kent [13 Ed.] 132. The same author says the construction of a deed as to its

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operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the subject and spirit of the contract. In the deed before us, when the parties have designed to make their agreements conditions they have said so in plain terms. They have not so said with respect to the expenditure of the wharfage. It does not appear that a failure to expend one-half of the wharfage on the north wharf is to operate upon the title before vested and render it defeasible. The parties contemplated no such a result and hence there is no condition subsequent. The stipulation is no more than a covenant, the breach of which does not defeat the easement before vested.

4. There is no merit in the further claim that the deed is void for uncertainty. The plat, made a part of the deed, shows clearly the "proposed western boundary line of the wharf," and also the "western boundary line of wharf as established." The first parties convey all their rights to all land eastwardly of the proposed western boundary line. This deed also says they convey all land in front of the red line and where the red line is broken, then all eastwardly of the black line. The old and proposed wharf lines are fixed as to location by their connection with the parallel and cross streets, which are also shown on the same plat. There can be no difficulty in identifying the property conveyed. None was experienced on the trial. Monuments appear at almost every step, for fixed street lines are monuments. It is true the copy of plat read in evidence did not by color show the red from black line as made upon the original plat. There appears to be, however, but one line along the property here in question, and there is, therefore, no room for confusion.

The judgment is clearly for the right party and it is affirmed. All concur

Norton v. Highleyman.

NORTON, *Appellant*, v. HIGHLEYMAN *et al.*

1. **Equitable Relief: MISTAKE OF LAW.** A mere mistake in a matter purely of law affords no ground for relief in a court of equity.
2. **Subrogation: MORTGAGE: VOLUNTEER.** Before a third party, making payment of a debt secured by mortgage, can be subrogated to the rights of the mortgagee, he must show either that he made the payment at the request of the mortgagor, or to protect some interest of his own, had at the time of the payment.

Appeal from Pettis Circuit Court.—HON. J. P.
STROTHER, Judge.

AFFIRMED.

E. J. Smith for appellant.

(1) In many cases where money is paid under a mistake of law it may be recovered back. "Mistake of Legal Right," 17 Cent. Law J. 22, and authorities cited. One exception to the general rule that money so paid cannot be recovered, is where the party seeking relief was misled as to the law of the transaction, by the false statements of the other party. 18 Cent. Law J. 7; *Berry v. Whitney*, 40 Mich. 65; *Boles v. Hunt*, 77 Ind. 355; *Mason v. Peletier*, 82 N. C. 40; *Jenkins v. German*, 58 Ga. 125; *Hardgrave & Mitchner*, 51 Ala. 151; *Montgomery v. Shockley*, 37 Ia. 107; *Bayose v. Insurance Co.*, 4 Daly, 246; *Pomeroy's Equity*, sec. 847; *Griffith v. Townsley*, 69 Mo. 13; *Whelan's appeal*, 70 Pa. St. 410; 21 Cent. Law J., 4, and cases cited; *McCormick v. Miller*, 102 Ill. 208; 1 Story's Eq., sec. 116. (2) The money of plaintiff went to pay off the mortgage on defendant's land. He was enticed into paying it by the fraud of Highleyman and the mutual error of plaintiff,

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the judges of the county court and the sheriff, and he is entitled to be subrogated to the rights of the county, and to foreclose the mortgage. *Jones v. Mack*, 53 Mo. 147; *Duke v. Bronett*, 51 Mo. 221; *Wells v. Lincoln Co.*, 80 Mo. 224. (3) This action is not barred by limitation. It is action to foreclose mortgage, and as such is not barred. *Chouteau v. Burlander*, 20 Mo. 482; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90. This is a real action, and as such the five years' statute of limitation (R. S., sec. 3230), does not apply. It only applies to personal actions. *Robb v. Woodward*, 50 Mo. 95, 103. (4) There is no misjoinder of parties.

Geo. P. B. Jackson for respondents, W. H., James R. and John I. Cook.

(1) In order to entitle a party to relief, independent of mistake of law, there must be other grounds of equitable relief, such as mistake of fact, which would justify the granting of relief; and the mistake must be mutual, or must arise from the fraudulent conduct of the other. *Matthews v. Kansas City*, 80 Mo. 231; *Summers v. Coleman*, 80 Mo. 488. Plaintiff's mistake was purely one of law. (2) Plaintiff is not entitled to be subrogated to the county's mortgage, upon his own showing. Subrogation is only a name for the relief to be granted in equity, and that particular relief, as well as any other, is precluded by the rule above referred to, that courts do not grant relief on account of mistakes of law. *Price v. Estill*, 87 Mo. 378; *Price v. Courtney*, 87 Mo. 387. The doctrine of subrogation is not adopted as a destruction of all former rules concerning volunteers. To entitle a party to such relief, as to a mortgage, he must have paid it at the instance of the mortgagor, or for his own protection. *Wolff v. Waller*, 56 Mo. 202. Plaintiff was a mere volunteer and not entitled to sub-

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rogation. (3) The plaintiff's pretended cause of action is barred by limitation. Even the mortgage to which he asks to be subrogated was barred. *Bush v. White*, 85 Mo. 339.

NORTON, J.—In September, 1866, one Jesse Fowler was the owner of certain land described in the petition, and mortgaged the same to Pettis county, to secure the payment of a debt for \$135.55, with ten per cent. interest. Highleyman, one of the defendants, subsequently, on the fifteenth of June, 1874, acquired title to the land subject to said mortgage. On the nineteenth of May, 1874, default having been made by Fowler in the payment of the debt secured by the mortgage, the county court ordered the sheriff to sell the premises to pay the debt, in pursuance of which the sheriff advertised the land for sale on the fourteenth of September, 1874. Said land adjoined a farm owned by plaintiff, and wishing to buy at said sale, he came to the place of sale on the day the land was advertised for sale and informed Highleyman and the sheriff that he was willing to pay at the sale all that the land was worth, and more than the debt, interest, and costs, for which it was to be sold, and that he was informed by them that the sale was postponed, and would not take place, on which plaintiff relied and went away. Notwithstanding this the land was sold to Highleyman, who bid \$183.68, the amount of principal, interest and costs, but did not at the time pay his bid. Seven days afterwards, on the twenty-first of September, 1874, the county court being in session, plaintiff informed the judges of these facts, who ordered him to pay the sheriff the \$183.68 so bid by Highleyman, together with the cost of making a deed, and plaintiff, believing that by so doing he would succeed to the right of Highleyman under said bid and get a deed, paid the money and the mortgage was entered satisfied. In December, 1877,

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Highleyman conveyed said land to defendant, W. H. Cook, who conveyed part of the same to other defendants, and still owns part himself, all of whom bought with notice.

The petition in this case is based on the above state of facts and asks judgment for \$183.68, with interest, and that the same be declared a lien on the land, and that plaintiff be substituted to the rights of Pettis county under said mortgage. The trial court sustained a demurrer to the petition, and rendered judgment for defendants, from which the plaintiff has appealed.

A mere mistake in a matter purely of law does not afford any ground for relief in a court of equity. *Price v. Estill et al.*, 87 Mo. 378. The mistake made by plaintiff, according to his own showing in the petition, was in supposing that in paying the amount of Highleyman's bid, even though made without his consent or knowledge, would entitle him to a deed and invest him with title to the land. In making this payment plaintiff was a mere volunteer, and the mistake he made, as to the legal effect of such payment, was one of law, unmixed with any mistake of fact.

Before a third party, making payment of a debt secured by mortgage, can be subrogated to the rights of the mortgagee, he must show either that he made the payment at the request of the mortgageor, or to protect some interest he had of his own at the time of the payment. *Wolff v. Waller*, 56 Mo. 293; *Evans v. Halleck*, 83 Mo. 376. The payment in this case was not influenced by either of these considerations, but has the appearance of having been made by plaintiff in order to give him an advantage over Highleyman.

The demurrer was properly sustained and the judgment is hereby affirmed. All concur.

Harrison v. Missouri Pacific Railway Company.

HARRISON V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Measure of Damages.** The measure of damages in ordinary cases where property is not entirely lost or destroyed, or practically so, but is only impaired in value or partially destroyed, by the wrongful act of another, is the difference between the value before the injury and immediately thereafter, and reasonable expenses incurred or value of time spent in reasonable endeavors to preserve or restore the property injured.
2. **Railroad : KILLING STOCK : MEASURE OF DAMAGES.** The owner of cattle negligently killed by a railroad train can only recover the difference between their value before the injury and immediately thereafter, and it is his duty to use reasonable effort to prevent loss after the injury and reduce, as much as possible, the damage ; and where such cattle are available after the injury, he cannot abandon them and then claim their full value.

Appeal from Lafayette Circuit Court.—HON. JOHN P. STROTHER, Judge.

REVISED.

Smith & Krauthoff with *T. J. Portis* for appellant.

The ruling of the court below, that the plaintiff was entitled to recover the full value of the injured animal, when she made no effort to save it, although she might have done so, or at least utilized it for food and realized from its hide and tallow, was erroneous. Where cattle are not killed by a train on a railroad, it is the duty of the owner to dispose of them to the best advantage. *Railroad v. Finnigan*, 21 Ill. 646.

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Graves & Aull for respondent.

Plaintiff notified defendant that she abandoned the maimed and lacerated carcass to them and she did so abandon same and was entitled to recover the entire value of her cow. *Jackson v. Railroad*, 74 Mo. 526; *Case v. Railroad*, 75 Mo. 638; *Railroad v. Mustard*, 34 Ind. 50; *Railroad v. Hays*, 35 Ind. 173. It was defendant's duty to care for same. *Finch v. Railroad*, 42 Ia. 304. The case cited by defendant is wholly irrelevant to the present case and is for negligence of servants. Defendant mangled and bruised plaintiff's milk cow, and if she had been required to dispose of the carcass for beef, there is no evidence that she was fit for beef. *Railroad v. Ireland*, 19 Kan. 405; *Railroad v. Lynch*, 67 Ill. 149.

RAY, J.—A milk cow, the property of plaintiff, was struck and injured by the engine and cars of defendant and several days thereafter died of the injuries thus received. The railroad was not fenced as required by law where the cow entered upon the track and was struck and injured, and the action is brought under the statute to recover double the damages. The liability of defendant is conceded, and the only question before us is as to the measure of damages. So far as pertinent and material the testimony is substantially to this effect:

The witnesses for plaintiff testify that the cow was of value for milk and butter and for breeding purposes, and their estimates range from sixty-five dollars to one hundred dollars. As to the injuries they say one hind leg was broken between the foot and knee, and that she was also injured in the side. The plaintiff discovered the cow immediately after the injury, and her brother testified that acting for plaintiff he at once notified the

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railroad that the cow was their property and that they would have nothing more to do with her. The witnesses for defendant put the value at forty dollars, and one or two of them put the damages at twenty dollars, estimating the cow to be only one-half as valuable after as before the injury. The evidence in its behalf tended further to show that the injuries were not of a character to cause the death of the cow, that one hind leg was broken but that there were no other injuries, that she survived for a period of ten days, but being without food or water starved to death. And it further tended to show that the cow was in good condition when injured and that if she had been dispatched promptly after the injury she would have been of value as beef. The jury found for the value of the animal, which they assessed at seventy-five dollars, and plaintiff had judgment in double the amount, from which defendant has appealed. The point made here is that the defendant is not responsible under the evidence for the full value.

If the evidence offered by defendant was true, and of this the jury were the judges, was the plaintiff under the state of facts thus shown authorized to abandon the cow even with notice to the defendant of her intention in this behalf? If not what course should she have pursued? It is the duty of a party to protect himself from the injurious consequences of the wrongful act of another, if he can do so by ordinary effort and care and at moderate and reasonable expense, and for such reasonable exertion and expense in that behalf he may charge the wrong-doer, and where by the use of such means he may limit and prevent further loss he can only recover such loss as could thus be prevented. If a person chooses to make his loss greater than it need have reasonably been, he cannot thereby make his claim on the wrong-doer any greater. 3 Parsons, 173; Field on Damages, 19. The measure of damages

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in ordinary cases where such property is not entirely lost or destroyed or practically and substantially so, but is only impaired in value or partially destroyed, is the difference between the value before the injury, and immediately thereafter, and reasonable expense incurred or value of time spent in reasonable endeavors to preserve or restore the property injured. Field on Damages, 621 ; 3 Allen, 594.

In the case just cited where A's horse was injured through the negligence of defendant's servants, the damages allowable were held to be the reasonable expense of the treatment of the injured horse by the veterinary surgeon, the value of the horse's services during disability, and the difference in his value before and immediately after the injury. Unless the injuries were of a character to make it probable that all reasonable efforts and moderate expense to cure or restore the animal would be useless, he could incur such moderate and reasonable expense and give such reasonable attention to her for that purpose, for which he could have charged the defendant, whatever the result might have been, and recovered therefor as part of his damages the sums thus reasonably expended and the value of his labor.

If the average farmer and owner throughout the country is not able, at moderate expense or reasonable trouble, to procure the means and treatment likely to be beneficial to such ordinary animals when thus injured, and cannot reasonably bestow the time and attention which would be thus required, may not still another course be open to him under such circumstances ?

If the animal is in condition, fit and suitable for beef after the injury, may he not with due circumspection dispose of her as such to the best advantage and recover the value less the sum thus realized ? In such case, the party must act with a due regard to the public health and when sure that the animal is free from fever or dis-

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ease and sound and healthy, but under these restrictions he may, we think, lawfully thus dispose of the animal thus injured. Neither of these courses was pursued by the plaintiff in the case before us. She discovered the animal immediately upon the happening of the injury, and upon the evidence in her own behalf she abandoned it altogether, although she did so with notice of her intention to the defendant. And where the injury inflicted is necessarily fatal and destructive of the value, the owner may treat her as dead, in the absence, at least, of evidence tending to show a value in its injured condition, and the conduct of the owner where he has killed the animal himself with a humane motive to put it out of misery has been approved in many cases. But he cannot wantonly abandon his property when only partially destroyed and, without reasonable efforts to prevent further loss enhance the damages at the expense even of the wrong-doer. The property does not cease to be the owner's or become the wrong-doer's by the act of injury. It is still his with regard to which a duty of this sort may exist.

Plaintiff's evidence did not show that the animal, when plaintiff discovered her immediately after the injury was in a feyered condition in consequence of her wounds, or was diseased in any way, or unfit for beef, or that it was under the circumstances impracticable to make any disposition of the animal. The extent and character of the injuries in this case, the condition of the cow, and her value before and immediately after the injury were questions properly before the jury, and the evidence was conflicting, and upon their determination of these questions, under proper instructions, depended, we think, the right of the plaintiff on the one hand to abandon the property, or his duty to take it in charge and to endeavor to limit and prevent a part of the loss.

In this state of the case there being evidence on

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which to base it, the defendant was, we think, entitled to the following instruction, which was refused :

"4. The jury are instructed that it was the plaintiff's duty to take charge of the animal after it was injured, if by any reasonable efforts on her part any part of her loss could be prevented, and if the evidence shows that by such reasonable efforts she could have prevented a portion of her loss, and she failed to do so, then the jury should deduct from the value of the said animal such amount as the evidence shows the plaintiff could by reasonable efforts have saved from loss."

In the case of *Railroad v. Finnigan*, 21 Ill. 649, Judge Breese, speaking for the court in a case quite similar to this, says : "The proof shows that the cow and steer were both fat, worth, one, ten dollars, and the other twenty dollars, for beef, and were good for beef, they having only been injured in the legs. We hold, under such facts, that it was the duty of the owner to have disposed of them to the best advantage, if practicable. He should have made some effort to make them available, and had no right to abandon them wantonly, and then claim the full value. The company had a just claim on the owner to do so, and thus reduce as much as possible the damage and injury. The criterion of damages in this case is, the value of the cattle as injured and their value before the injury." See also *Jackson v. Railroad*, 74 Mo. 526.

We are of opinion, therefore, that in this case the trial court erred in refusing the above instruction asked by the defendant, and upon that ground we reverse the judgment and remand the cause. All concur.

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THE STATE V. GABRIEL, *Appellant*.

1. **Criminal Practice : CHANGE OF VENUE.** The statute (R. S. sec. 1856) confers no authority to award a change of venue to another circuit, where the ground of the change is the prejudice of the inhabitants of the county in which the cause is pending.
2. — : —. An order of the court improvidently made in such case, transferring the venue to another circuit, is a nullity. The court can set it aside and transfer the cause to another county in the circuit.
3. **Larceny : RES GESTAE.** The *res gestae* in larceny is not restricted to the limited time when the fingers reach out and grasp the article in question. The *quo animo* and all actions and words whereby that is demonstrated form part of the *res gestae*, and thus become admissible in evidence, to explain the character of the act charged to be a crime.
4. — : — : **DECLARATIONS OF THIRD PERSONS.** Declarations of a third person are not hearsay, and, therefore, are admissible in evidence, where they are the natural and inartificial concomitants of an act done by him, and are explanatory of such act and such act is a part of the *res gestae*.
5. — : —. On the trial of an indictment for the larceny of sheep, where the transaction was made up of a variety of incidents extending over a period of several days, and was not at an end until the sheep were branded as his own by the defendant, all acts and words which occurred, or were related during that period of time, tending to show that defendant branded the sheep by mistake or inadvertence and not with a larcenous motive, were competent evidence in his behalf.
6. **Criminal Practice : VARIANCE.** Where one is indicted in the common form for grand larceny, an instruction is improper which authorizes a conviction under Revised Statutes, section 1315, if the property was lost and the defendant converted it to his own use with felonious intent.
7. **Criminal Pleading : STATUTE.** Where an indictment is founded on a statute creating an offence unknown to the common law, it must set forth all the constituent facts and circumstances necessary to bring the accused fully within the statutory provisions.

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8. **Criminal Practice: PETIT LARCENY.** It is only where the evidence shows, on a trial for grand larceny, that the value of the property taken would constitute petit larceny that the defendant may be convicted of the latter offence under Revised Statutes, section 1315.
9. ——. Revised Statutes, section 1654, authorizing a conviction of an offence inferior in degree to the one charged in the indictment, where the latter consists of different degrees, has reference to cases where the evidence shows the higher offence belongs to homicidal crimes, etc.

Appeal from Lawrence Circuit Court.—HON. M. G. MCGREGOR, Judge.

REVERSED.

Joseph Cravens for appellant.

(1) The motion of defendant to strike this case from the docket in the Lawrence circuit court should have been sustained. The order of the Jasper circuit court, changing the venue to Greene county, gave that court jurisdiction, and it was forever gone from the Jasper circuit court. *Henderson v. Henderson et al.*, 55 Mo. 534; *Gilstrap v. Felts*, 50 Mo. 428; *State v. Daniels*, 66 Mo. 192. The statute on the subject of changes of venue has always been construed to be more directory than otherwise. *State v. Gates*, 10 Mo. 400; *State v. Elkins*, 63 Mo. 159; *State v. Underwood*, 57 Mo. 40; *State v. Sayers*, 58 Mo. 58; *State v. Willow*, 68 Mo. 91; *Porter v. State*, 5 Mo. 538. (2) The instruction asked by the defendant directing an acquittal should have been given, as there was no evidence to support the charge contained in the indictment, or to establish the commission of any offence, and in the absence of such sufficient proof, it is the duty of the court to direct an acquittal. *State v. Burgdorf*, 53 Mo. 65; *State v. Jaeger*, 66 Mo. 173. (3) The deposition of Taylor West should have been read to the

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jury. It shows clearly that defendant was not trying to steal Glasgow's sheep. When he found sheep among his own flock that he did not own, this deposition tells us he was driving them to the man who afterwards charges him with stealing sheep. The acts of defendant in driving the sheep to Glasgow's house and of the boy in driving them back were proper to go to the jury, and the declarations accompanying the acts were admissible as explanatory of such acts. They were admissible for the purpose of showing the intent of defendant in dealing with his neighbor's sheep. It seems we have reached the period in this state when it is only necessary to accuse in order to convict. No proof of guilt of the offence charged is necessary. *State v. Gressner*, 19 Mo. 247; *Crago v. Gibson*, 19 Mo. 365; *State v. Fritchler*, 54 Mo. 427; *State v. Graham*, 46 Mo. 490; *State v. Matthews*, 20 Mo. 55; *State v. Underwood*, 37 Mo. 225. (4) Instruction number one, given for the state, was erroneous. There was no evidence, not even a circumstance, going to show that defendant "stole, took, and carried away" the sheep in question. *State v. Joeckel*, 44 Mo. 234; *State v. Schoenwald*, 31 Mo. 147; *Atkins v. Nicholson*, 31 Mo. 488. (5) So the state's instruction number two was wrong. The defendant could not be convicted under Revised Statutes, section 1311. *State v. Arter*, 65 Mo. 653; *State v. Stone*, 68 Mo. 101; *State v. Dodson*, 72 Mo. 283.

B. G. Boone, Attorney General, for the state.

(1) The trial court was not authorized on defendant's application for a change of venue, alleging prejudice on the part of the inhabitants of Jasper county, in sending the case to Greene county, which was not in the same judicial circuit as Jasper. Section 1856, Revised Statutes. The order granting the change of venue being

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without authority, was a mere nullity, and the court did not thereby lose jurisdiction, either to try the case or grant a change of venue to a county within the circuit. *State v. Kring*, 74 Mo. 612; *State v. Hayes*, 14 Mo. App. 173. (2) The court ruled properly in refusing to permit the prosecuting attorney to introduce evidence relative to defendant's character. This is never permitted, except in rebuttal of evidence offered by defendant as to good character. *State v. Creason*, 38 Mo. 372; 1 Denio, 282; Whar. on Crim. Ev. [8 Ed.] secs. 62, 63, 64. (3) The remark alleged to have been made by the prosecuting attorney, for which defendant assigns error, was not such as to prejudice the defendant and the court will not reverse. It is not every indiscreet remark made by a prosecutor that will justify a reversal. *State v. Guy*, 69 Mo. 432; *State v. Estis*, 70 Mo. 427; *State v. Stark*, 72 Mo. 37. Unless a prosecutor misstates the law or the facts in a case his conduct will not be reviewed by this court. *State v. Hopper*, 71 Mo. 433; *State v. Hoffman*, 78 Mo. 256. (4) The deposition offered in evidence was properly excluded. The matter it contained was not only irrelevant and incompetent, but mere hearsay. (5) The court gave four instructions at the instance of the state. The first instruction for the state is the usual one as to grand larceny, and was proper under the indictment and the facts. The second, in regard to petit larceny, was likewise correct. The third, which is complained of by defendant, in regard to the conversion of the property or the doing of any act by defendant with intent to convert the property to his own use, is a proper declaration of law applicable to this case upon the evidence. *State v. Matthews*, 20 Mo. 55; *State v. Martin*, 28 Mo. 580; *State v. Williams*, 35 Mo. 229; *State v. Gazzell*, 30 Mo. 92. The instruction asked by defendant and refused was covered by the instruction given by the

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court on its own motion, which contained a clearer and fuller statement of law than the one asked by defendant.

SHERWOOD, J.—The defendant, indicted for the grand larceny of several sheep, when tried, was convicted of petit larceny, though the only evidence as to their value showed that they were worth \$32.50.

I. There was no error in setting aside the order transferring the cause to the circuit court of Greene county, since that order had been improvidently made, as section 1856, Revised Statutes, confers no authority to award a change of venue to another circuit where the ground of the change is the prejudice of the inhabitants of the county in which the cause is pending. And as the first order awarding a change of venue was a nullity, it was proper to act on defendant's application for a change of venue, and to award that change to Lawrence county in the same circuit.

II. Taylor West's deposition should have been admitted in evidence. It disclosed a state of facts which went a considerable way towards showing defendant had no larcenous designs upon the sheep of his neighbor; and taken with other testimony in the cause would have had a tendency to show that any apparently criminal act of defendant in branding Glasgow's sheep might have readily occurred through mistake or inadvertence, and not as the result of any improper motive. Other evidence in the cause introduced prior to the offer in evidence of West's deposition had established that the fences around defendant's enclosures were in a lamentably poor condition and dilapidated state, so that his sheep of which he had quite a large flock, readily got out of, and those of his neighbors readily got into his enclosure; that Glasgow, from whom the sheep are charged to have been stolen, lived two miles from defendant; that Glasgow's son at the time the sheep in question were missing,

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was engaged in herding his father's flock, two hundred head on the open prairie; that there was no water there, that the place of herding was close to the timber, and the timber extended round to where the defendant lived, and that there was water there; that Glasgow's son sometimes left the sheep; that some of the sheep of the defendant had the same ear marks as those of Glasgow, but which the latter knew were not his; that some of the sheep of defendant and those of Glasgow "looked some alike"; that the sheep of the latter when sheared in the spring, had red paint daubed on their foreheads, which by the time the sheep in question were missed from their herding place had mostly washed off; that only fourteen of Glasgow's sheep were seen within defendant's enclosure on Sunday, at which time, according to the testimony of Strickland, they were not branded in defendant's mark, a "J" on the hip; that according to Strickland this branding occurred on the following Monday morning when a number of sheep of defendant also, as well as those in question, were thus branded at the same time; that on that morning a number of sheep of Glasgow's were marked as were his, with red paint on their foreheads, were not branded, but turned outside by defendant; that a week before Glasgow's sheep were missed he had separated a bunch of stray sheep from his and had them driven by his son for about a mile in the direction of the defendant's farm, where afterwards he found them, when he went for his own with defendant's sheep unmarked and unbranded. That defendant exhibited every appearance of being desirous of giving up Glasgow's sheep; offered and gave him every assistance in separating them from those of his own; said that some of his sheep were out in the woods, and that if Glasgow and his son would come back on some other day he would have the rest of his sheep up and if any more of Glasgow's sheep were with his, Glasgow could

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get them. This promise was kept by defendant on the following Friday when Glasgow obtained five more of his sheep; that Glasgow obtained in all thirteen sheep from defendant, which the latter had branded, worth \$2.50 a head; that Glasgow claimed two other sheep which defendant had also branded, but defendant claimed them as his own and refused to give them up, and Glasgow, although willing to swear they were his, never brought suit for them.

The only circumstances in the case having any damaging tendency as to defendant's guilt are these: On Monday morning after Glasgow's son had asked defendant on the day before if there were any stray sheep in his pasture, and defendant had replied in the negative, defendant and his tenant, Strickland, according to the latter's story, after turning outside a number of sheep painted red in their foreheads, proceeded in broad daylight to brand as his own a large number of others, among them those claimed by Glasgow; and, according to Glasgow, that defendant when interrogated by him, when he went for the sheep on the next day, Tuesday, after the sheep were said to have been branded, said he branded the sheep because he thought they were his own; branded them four or five weeks ago, and then said a few days ago. And the statement of Strickland as to the sheep having been branded on Monday is corroborated by Glasgow's son who testified that when he saw them in the defendant's pasture on Sunday they were not branded, but when he and his father went for them on Tuesday they were branded the same as the defendant's.

In this attitude of the case, any legitimate evidence having any tendency to exonerate defendant from the charge made against him; having any bearing on the subject of guilt which would obviously include the circumstances throwing light on the transaction, should

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have been admitted. Such evidence, though slight, was that contained in the deposition aforesaid, which was to the effect that the witness lived one and a half miles from defendant's residence, and between that point and where Glasgow lived; that some time in the month of June, which, it seems, was prior to the time when Glasgow missed from his flock a portion of his sheep, the defendant came to witness' place driving a bunch of fifteen or twenty sheep towards Glasgow's and remarked that they were Glasgow's sheep, and that he was taking them home; that witness did not observe any marks or brands on them; that in two or three days afterwards, Glasgow's son came by witness' house with about a dozen of the sheep and said they were not their's and that they were a part of the sheep defendant had brought over to his father's a few days before, and that his father had sent him back with them to the defendant.

If the act of Gabriel in driving the sheep towards the residence of Glasgow before the time of the commission of the alleged larceny possessed any probative force, then his declarations which accompanied that act constitute a part of the *res gestæ* giving, as they did, quality to the act and clothing the mere nude act with the garb of legal intelligibility. The doctrine is well settled that whatever words depict the character of the principal fact, shed upon it the proper light when it is brought before the camera of judicial investigation, are "verbal acts, indicating a present purpose and intention, and are, therefore, admitted in proof like any other material facts." 1 Grif. Evid., sec. 108 and cases cited.

The *res gestæ* in larceny is not restricted to that limited period of time when the fingers reach out and grasp the article in question, any more than are the *res gestæ* confined in a case of homicide to the knife thrust which loosens the "silver chord" of life. The *quo*

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animo, and all actions and words whereby that is demonstrated, form part of the *res gestae*, and thus become admissible. *Garber v. State*, 4 Coldw. 161, and cases cited. "Nor are there limits of time within which the *res gestae* can be arbitrarily confined. They vary in fact with each particular case." "The test is, were the declarations the facts talking through the party, or the party's talk about the facts. *Instinctiveness* is the requisite, and when this obtains, the declarations are admissible." Whart. on Crim. Ev., secs. 262, 691. In the case at bar, there was much in the evidence already related, and much in that to be presently mentioned, tending to show that mistake or inadvertence, and not larcenous motive, caused the branding of Glasgow's sheep by defendant. His act then of separating the sheep spoken of from his own, and driving them home to the residence of Glasgow, whom he believed to be the owner, so shortly before the act litigated in the present instance, had a tendency to show that honesty, and not dishonesty of purpose actuated him throughout the whole transaction. And even when the statements were made by an accused party *after* the commission of the supposed criminal act, where such statements were plainly not self-serving, but the usual and natural utterances, such statements, showing as they did, the *animus* of the act, were held by this court admissible. *State v. Graham*, 46 Mo. 490.

And for these reasons, the verbal declarations of Glasgow's son, when driving the sheep back, were also admissible, though the statement of a third person; for the rule is, that when such declarations of a third party are the natural and inartificial concomitants of an act done by him, and are explanatory of such act, and such act is part of the *res gestae*, such declarations are not hearsay, and are therefore admissible. *Hunter v. State*, 40 N. J. L. 495; *State v. Hayden*, 9 Rep. 237. Alluding

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to the rule excluding hearsay, an author of eminent and acknowledged authority says: "The principle does not extend to the exclusion of any of what may be termed real or natural facts and circumstances, in any way connected with the transaction, and from which any inference as to the truth of the disputed fact can reasonably be made." 1 Starkie's Ev. [6 Ed.] 65. If on the morning when the sheep were said to have been branded by defendant, he had driven a bunch of sheep out of his enclosure, and driven them toward Glasgow's, declaring his reason therefor as before stated, this certainly would have been competent; and it does not seem that the competency of such evidence is affected, or that it any the less fails to disclose the all-important fact of the animus which actuated him, because several days had elapsed between the occurrence and the one which gave rise to the prosecution. Here the transaction was made up of a variety of incidents, and extended over the period of several days, and it was not at an end until the sheep were branded. Anything, therefore, whether of acts or words, as before related, which occurred, or were uttered, during that period of time, tending to elucidate the principal fact in dispute, to-wit, the motive with which the sheep were branded, was competent.

III. It is insisted that the instruction in the nature of a demurrer to the evidence, requested by the defendant, should have been given. There are some things in this record, which in addition to those previously mentioned, give color to this position. Allen testified that about three years before he sold defendant thirty-eight or more sheep, a cross between Southdown and Cotswold, and that such a cross produces sheep with motley faces and red legs; and the testimony of Glasgow and his son that some of the sheep branded in defendant's mark were Glasgow's, is based upon just such peculiarities. In addition to that, Strickland, as he confesses, was hostile to

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defendant; moreover his character for truth and veracity was declared bad by a majority of the witnesses examined on the subject. But notwithstanding this, it is not certain that the court erred in refusing the instruction in question. If defendant with knowledge that some of the sheep he was about to brand belonged to Glasgow, and branded them with a view to conceal their identity, and to establish a fictitious ownership in himself, this would make his crime complete; and if Glasgow's son came on Sunday and claimed the sheep, and defendant branded them on Monday, and then on Tuesday told a falsehood as to when he branded them, this was a circumstance worthy of consideration by the triers of the facts as bearing on the question of the motive with which the act was done. 2 Best. Evid., sec. 576. For these reasons it was proper to let the case go to the jury.

IV. The third instruction given at the instance of the state was erroneous for several reasons: The indictment is in common form for grand larceny; and it has been ruled in such case that an instruction is improper which, based on section 1315, authorizes a conviction for that offence, if the property was lost, etc., and defendant converted the same to his own use with felonious intent, etc.; and that this was true notwithstanding the evidence would have sustained a conviction under section 1315. Norton, J., remarking: "The indictment in the case at bar charges the defendant with a felonious taking, stealing and carrying away of the watch, and this was all he was called upon or required to defend. We think that the instruction complained of authorized a conviction for the offence created by section 45, *supra*, and as the indictment on which the defendant was arraigned and tried, failed to allege the facts necessary to constitute an offence under that section, that the court erred in giving the instruction. If it was intended to hold the

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defendant liable under that section, a proper indictment should have been preferred for that purpose, so that defendant would have been notified of what he would be required to defend." *State v. Arter*, 65 Mo. 653. The rule is that where the indictment is based upon a statute creating the offence, an offence unknown to the common law, the indictment must set forth all the constituent facts and circumstances necessary to bring the accused perfectly within the statutory provisions. *People v. Allen*, 5 Denio, 76; 1 Arch. Crim. Prac. p. 68, note 1; *Hall v. State*, 3 Cold. 125; Bishop on Stat. Crimes, secs. 418, 421, 422.

And indeed the constitution of our state requires that the accused be informed of the "nature and cause of the accusation" against him. Art. 2, sec. 22. This command would not be complied with were it permitted to indict a man for the larceny of an animal and then convict him on evidence, not that he *stole* the animal, but that he branded or killed it with intent to steal it as set forth in section 1311. Nor does section 1315 apply for the reasons already given. Nor does either that section or section 1316 apply for the additional reason that there is no evidence that the sheep were lost or that they were strays. And the instruction was also erroneous because there was no evidence whatever, aside from the act of branding that the defendant did any other act, etc.

The very case this record presents was anticipated in *State v. Stone*, 68 Mo. 101, where Norton, J., after alluding to the constitutional provision I have referred to, and to the necessity of indictments based upon purely statutory provisions, being so drawn as to charge the offence as in the statute defined, remarks: "It might as well be contended that a person indicted under section 25, *supra*, for stealing a hog, could be convicted under section 30, which makes it a larceny for any person to alter the mark or brand of a hog with intent to steal or convert it to his own use," etc.

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V. In addition to the reasons given in the last paragraph, the instruction as to petit larceny was also erroneous for several reasons, one arising upon the evidence, the others upon the law. The only evidence introduced as to the value of the sheep was that of Glasgow, the owner. His testimony showed them to be worth \$32.50. It is true that section 1319, a new section, allows a defendant on trial for grand larceny, to be convicted as was the defendant, but this is only "*when the evidence shows the value of the property taken would constitute a case of petit larceny.*" And section 1654 does not help the matter, as that section being in *pari materia*, must be read in connection with the one already quoted, and besides section 1654, while it allows a conviction for a lesser offence when a greater one is charged, only allows such conviction when the evidence shows the higher offence to have been committed in cases of homicidal crimes, etc. And, besides, the jurors are sworn to try the accused according to the law and the evidence; they cannot, without evidence, arbitrarily discount the testimony of a witness and then base a verdict upon such discounted testimony. Their sole reliance for the value of the sheep was upon Glasgow's evidence, and they could not invoke to their aid their own inner consciousness, or, as it is elsewhere expressed, "their knowledge of current events."

VI. The defendant having been tried for and convicted of an offence not set forth in the indictment, the judgment must be reversed and the cause remanded. All concur. Norton, J., in the result.

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DRAKE, *Appellant*, v. CURTIS *et al.*

1. **Will, Probate of :** RECORD AND JUDICIAL PROCEEDING : ADMISSION OF FOREIGN WILL IN EVIDENCE. The record of the probate of a will is a record and judicial proceeding within the meaning of the act of congress, and it is not necessary to the admission of a foreign will with the probate thereof in evidence, that they should have been recorded in this state.
2. **Evidence :** DEED BY DEVISEE : IDENTITY OF GRANTOR AND DEVISEE. Where a devisee in a will conveys his interest in the land devised by a name different from that contained in the will, the identity of the grantor with the devisee named in the will should be established to entitle the conveyance to admission in evidence.

Appeal from Scotland Circuit Court.—HON. BEN. E. TURNER, Judge.

REVERSED.

Myers & Moore for appellant.

There is nothing in the plea of ten years possession. Plaintiff has shown that he has purchased Curtis' interest, whatever that may have been, and this raises a *prima facie* right to recover, unless defendants can show a better title than that of the common grantor. 64 Mo. 545. There is nothing inconsistent in plaintiff showing title through Curtis and also through the other source. The petition sufficiently describes the land. Defendants admit they were in possession, and have no right to complain of the description. The evidence shows Joel Curtis held as agent only, and his possession could not have been adverse to his principal. 43 Mo. 153. The court erred in excluding the certified copy of the will of Curry. 13 Mo. 612; 50 Mo. 579; 80 Mo. 125; 31 Mo. 40. A will probated according to the laws of Iowa is sufficient

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to pass title to real estate owned in Missouri, and if properly authenticated, should be admitted in evidence. Con. U. S., sec. 1, art 4. Possession and improvement on a part of the land under color of title, is sufficient possession of the whole tract to authorize the plaintiff to maintain ejectment against defendants, who have no title to the part of the tract in their possession. 49 Mo. 397; 43 Mo. 556; 53 Mo. 305; 60 Mo. 59; 64 Mo. 545; 74 Mo. 142.

McKee & Jayne and *Bartlett & Givens* for respondents.

The instruction of the trial court to find for respondents was correct. There was no sufficient authentication of the will of Wm. Curry to admit it as evidence in the cause. *Neale v. McKinstry*, 7 Mo. 129. Neither the clerk of the county court nor the notary public had authority to take proof of the execution of wills under the Revised Statutes in force at that time. See Revised Statutes of Missouri for the year 1845, page 1,031, section 18, being the law under which this will was attempted to be probated. And no commission was ever issued to said clerk, or notary public to take the evidence of said will. No authenticated copy of said will ever was recorded in this state, and could not, therefore, pass title to real estate here. R. S., Mo. 1845, p. 1084, secs. 35, 36. The will could not pass title without being recorded here, and the attempted authenticated copy of the record of the will from Iowa could not be received as evidence here. Without record here the will has no extra territorial force in this state. *Cabanne v. Skinker*, 56 Mo. 357. There was no evidence that the deeds from the persons mentioned in the bill of exceptions, were deeds of the children and heirs of Jack and Tena, as mentioned in the will of Curry. As to the limitation claimed by re-

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spondents in their answer, appellant's own evidence showed that Joel Curtis had been in possession of said lands for more than ten years before the commencement of this action and improved the same. Appellant had no such possession as would enable him to maintain this action.

HENRY, C. J.—This is an action of ejectment for the possession of a tract of land in Scotland county, which is a part of an eighty acre tract entered by one William Curry, who received a patent from the government therefor. By his last will and testament, and the third clause of the same, he manumitted his slaves, Jack and Tena, and their children, eight in number, naming them. He afterwards immigrated to the state of Iowa, Lee county, where he died, and his will was duly admitted to probate in the state of Iowa.

Plaintiff offered a certified copy of the proceedings of the probate court of Lee county, Iowa, and of the judgment of that court probating the will; but on objection made by defendant it was excluded. Other testimony was offered by plaintiff, but the trial resulted in a judgment for defendant, from which this appeal is prosecuted. The exclusion of the certified copy of the record of the probate of the will necessarily defeated the plaintiff's recovery. That excluded, there was no testimony showing the title out of Curry's heirs. Was it error to exclude the evidence? Since the decision of *Bright et al. v. White*, 8 Mo. 421, it has been uniformly held by this court that "the record of the probate of a will is a record and judicial proceeding within the meaning of the act of congress of May 26, 1790." 13 Mo. 618; *Lewis v. City of St. Louis*, 69 Mo. 595; *Bradstreet v. Kinsella*, 76 Mo. 63. "And it is not necessary to the admission of such will with the probate thereof, that they shall have been recorded in this state under section

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34 of the statute of wills." Wag. Stat. 1363. Cases above cited.

As the judgment must for this error be reversed for a new trial, it will not be amiss to call attention to other errors which, we think, were committed and might be repeated in another trial. Plaintiff's deeds from the devisees in Curry's will were admitted without proof of the identity of the grantors with the devisees named in the will. In the third clause of the will the testator manumitted Jack and Tena and their children, Milly, Charles, Jeremiah, Delphy, Jacob, Sarah, Abraham and Dicky. By the fourth clause he gave all his property to Jack and Tena and their children, whom he had named in the preceding clause, and the effect was, therefore, the same as if the devise had been to Jack and Tena and the children by name. There was no necessity for proof of the identity of Jack, Jacob, Jeremiah, Sarah or Charles, who in those names executed the conveyances made by them; but Mary McDowell executed a deed claiming to be the daughter of Milly, and that deed was admitted without proof of Milly's death, or that the said grantor was her only heir, or, in fact, a sole heir or joint heir with others; and Bell Brown and her husband executed a deed, she claiming to be the "Dicky" named in the will, and it was admitted without any proof of that fact. No deed was shown from Delphy or Abraham. The judgment is reversed and the cause remanded. All concur.

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THE STATE V. RUSSELL, *Appellant*.

1. **Criminal Law : INFORMATION : AMENDMENT.** An information for a criminal offence in a case originating in an inferior court cannot be amended in an appellate court.
2. ——— : ———. The legislature cannot authorize the institution of a criminal prosecution in any other mode than that prescribed by section twelve of article two of the constitution of 1875, and the word "information," as used in that section, means the common law pleading known by that name. *The State v. Kelm*, 79 Mo. 515.

Appeal from Shannon Circuit Court.—HON. J. R. WOODSIDE, Judge.

REVERSED.

J. D. Storts for appellant.

B. G. Boone, Attorney General, for the state.

The only error complained of by the appellant is that the information was not signed and verified by the prosecuting attorney. The record was made by a special prosecuting attorney, and although it is not expressly shown that he was appointed in the absence or inability to act of the regular prosecutor, this court will presume that the trial court proceeded regularly, and in conformity to law. *State v. Brown*, 75 Mo. 317.

HENRY, C. J.—The defendant was prosecuted before a justice of the peace of Shannon county for a misdemeanor, found guilty, and on appeal to the circuit court of the county was again convicted, and has appealed to this court. The complaint against him was made by one D. E. Dye, who made an affidavit before the justice,

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charging defendant with the offence. Dye was not the prosecuting attorney. In the circuit court, the prosecuting attorney was permitted to file an amended information differing from that filed in the justice's court, in that it was signed by O. L. Smith, assistant prosecuting attorney, and averred that defendant, when he fired the pistol, was not "a sheriff, or other officer, in the discharge of any official duty."

I have failed to find in the statute any provision allowing, in an appellate court, an amendment to an information in a case originating in an inferior court. It was not an amendment that the prosecuting attorney filed in the circuit court. There was no information on file to amend. The information filed by him was the first one filed. Section 3060 has no application to criminal proceedings, and section 2027 only allows an amendment in the justice's court, and there it must be made before "the case is finally submitted to the justice, or a jury." It, therefore, becomes necessary to determine the sufficiency of the information filed by Dye before the justice.

The statute, section 2025, provides that "prosecutions before justices of the peace for misdemeanors, must be commenced by an information in the form and nature of an affidavit subscribed and sworn to, and filed with the justice," and section 2026, requires the information to "set forth the offence in plain and concise language, with the name or names of the person or persons charged therewith, if known," and also prescribes the form of the affidavit; and nothing in the body of the section, or the prescribed form, indicates that the information or affidavit need be made by the prosecuting attorney, or other officer, whereas, when the proceeding is commenced in the circuit court, the prosecuting attorney is required to file an information. Sec. 1763. The sections in relation to the proceeding before a justice of the

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peace, show conclusively that the word "information," as employed in those sections, is not the common law pleading known by that name, contemplated by section twelve, article two, of our "Bill of Rights," which expressly requires that, in all other than certain enumerated cases, "offences shall be prosecuted criminally by indictment, or information." The legislature cannot authorize the institution of a criminal prosecution in any other mode. *State v. Kelm*, 79 Mo. 515; *State v. Briscoe*, 80 Mo. 643. The judgment is reversed and cause dismissed. All concur.

EUBANK V. THE CITY OF EDINA, *Appellant*.

1. **Corporate Existence: PLEADING.** The averment in an action against a city that it is a corporation created and organized under the provisions of article 3, of chapter 89, Revised Statutes, sufficiently alleges the incorporation of the city as one of the fourth class.
2. ———: **ADMISSION OF.** Where a public corporation appears to an action and makes an affirmative defence, like a private corporation, it admits its corporate existence.
3. ———: **EVIDENCE.** Where, without question or objection, the mayor and other officers testified as to their official capacity and a pamphlet purporting to be the ordinances of the city was put in evidence showing that defendant has a mayor, alderman and such other officers as cities of the fourth class have, the proof was ample that the defendant was a municipal corporation and a city of the fourth class.
1. **Defective Sidewalk: EVIDENCE.** In an action against a city for injury from a defective sidewalk it is competent to introduce evidence showing the condition of the walk, but it is for the jurors and not for the witnesses to determine from these facts whether under all the circumstances the walk was in a reasonably safe condition. The witnesses should not be allowed to state if they

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knew whether the sidewalk was in a reasonably safe condition for the traveling public.

Appeal from Knox Circuit Court.—HON. BEN. E. TURNER, Judge.

AFFIRMED.

S. B. Davis and *O. D. Jones* for appellant.

(1) The petition does not state facts sufficient to constitute a cause of action. No facts were proved to show that defendant was a city. *Robinson v. Jones*, 71 Mo. 582. (2) There was no evidence that the sidewalk was built by the city or received by it or that the city was under any legal obligation to keep it in repair. *Craig v. Sedalia*, 63 Mo. 417; *City, etc., v. Miller*, 66 Mo. 467. (3) Public streets of a city can only be located, laid out and named by ordinance and plat. *Carrol v. St. Louis*, 4 Mo. App. 191; *Parkinson v. St. Louis*, 4 Mo. App. 322. (4) It was proper to inquire of witnesses who had knowledge of the condition of the walk at the point of the injury whether one by ordinary care could pass the place without accident. *Craig v. Sedalia*, 63 Mo. 417. (5) The gist of the action was the negligence of the city and it must appear that the officers knew of the defect. *Schweickhardt v. St. Louis*, 2 Mo. App. 571.

L. F. Colley for respondent.

(1) The city of Edina is bound to keep its streets, sidewalks, and public ways, in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel in the usual modes by night as well as by day, and will be held liable for all injuries happening by reason of its negligence in this respect. *Blake v. St.*

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Louis, 40 Mo. 569; *Smith v. St. Joseph*, 45 Mo. 449; *Bowie v. Kansas City*, 51 Mo. 454; *Bassett v. St. Joseph*, 53 Mo. 290; *Hull v. Kansas City*, 54 Mo. 598; *Oliver v. Kansas City*, 69 Mo. 79; *Kiley v. Kansas City*, 69 Mo. 102; *Staples v. Canton*, 69 Mo. 592; *Beaudeau v. Cape Girardeau*, 71 Mo. 392; *Welsh v. St. Louis*, 73 Mo. 71; *Russell v. Columbia*, 74 Mo. 480; *Bonine v. Richmond*, 75 Mo. 437; *Loewer v. Sedalia*, 77 Mo. 431; *Schweickhardt v. St. Louis*, 2 Mo. App. 571; *Dillon on Mun. Corp.*, secs. 789, 790 and 791, and case cited. (2) The petition states a good cause of action, clearly and fully set forth. The negligence of the corporation in regard to its duty, and ordinary care and prudence on the part of the individual, form the necessary elements of what it takes to constitute a cause of action. If the facts requisite to constitute a cause of action are necessarily inferable from the petition, it will be held good after verdict. Omission to state a material fact will be obviated if the pleading of the opposite party puts the matter in issue. *Smith v. St. Joseph*, 45 Mo. 449; *Bowie v. Kansas City*, 51 Mo. 454; *Bassett v. St. Joseph*, 53 Mo. 290; *Kiley v. Kansas City*, 69 Mo. 102; *Garth v. Caldwell*, 72 Mo. 622; *Edmonson v. Phillips*, 73 Mo. 57; *Alexander v. Campbell*, 74 Mo. 142; *Chouteau v. Gibson*, 76 Mo. 49; *McKonn v. Williams*, 77 Mo. 467; *Worth v. Springfield*, 78 Mo. 107; *Stewart v. Clinton*, 79 Mo. 603; *Slack v. Lyon*, 9 Pick. 62; *Bliss on Code Plead.* secs. 175 and 437, and cases cited; *R. S.*, secs. 3546 and 3775. (3) All formal defects are waived when defendant fails to demur and answers over. *Sappington v. Ry. Co.*, 14 Mo. App. 86; *Hall v. Johnson*, 57 Mo. 521. (4) When a corporation is sued and appears to said suit, files an answer and defends, such appearance is conclusive evidence of its legal existence for the purposes of the pending suit, and no proof of that fact will be required. In this case the defendant having ap-

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peared and answered is estopped to deny its own existence. *Hudson v. Railroad*, 53 Mo. 525; *Seaton v. Railroad*, 55 Mo. 416; *Whitehouse v. Railroad*, 64 Mo. 523; *Smith v. Railroad*, 55 Mo. 526; *Sappington v. Railroad*, 14 Mo. App. 86; *Dillon on Mun. Corp.* [2 Ed.] secs. 50 and 51; *Singer v. Railroad*, 6 Mo. App. 427; *Union Depot Co. v. St. Louis*, 8 Mo. App. 412; *Bigelow on Estoppel* [3 Ed.] 461 *et seq.*, and cases cited; *Ins. Co. v. Salt Co.*, 31 Mich. 346. (5) And in regard to corporations there is no distinction between municipal and private bodies. *Society for Savings v. New London*, 29 Conn. 192; *Railroad v. People*, 91 Ill. 251; *Martel v. East St. Louis*, 94 Ill. 67; *Roby v. Chicago*, 64 Ill. 447; *Railroad v. Joliet*, 79 Ill. 39; *Logan Co. v. Lincoln*, 81 Ill. 156; *Curnen v. New York*, 79 N. Y. 511; *Calhoun v. Emigrant Co.*, 93 U. S. 124, 130; *Bigelow on Estoppel*, 462. (6) The city of Edina, by appearing and answering in its corporate name and making the defence it did, admitted its corporate existence and is estopped from denying the same. (7) The testimony of experts is not admissible upon matters of judgment within the experience of ordinary jurymen. These witnesses did not profess to have any superior knowledge of such matters, and the jury was as competent as they were to draw proper conclusions from the appearance and condition of said sidewalk. The jury must draw their own inferences. *Wagner v. Jacoby*, 26 Mo. 530; *Newmark v. Ins. Co.*, 30 Mo. 160; *Gavisk v. Railroad*, 49 Mo. 274; *State v. Tompkins*, 71 Mo. 613; *Naughton v. Slagg*, 4 Mo. App. 271; *Abbott's Trial Evidence*, 586. *Wharton's Evidence*, sec. 512; *Loewer v. Sedalia*, 77 Mo. 431.

BLACK, J.—This is an action for personal damages, occasioned, it is alleged, by a defective sidewalk. The walk was three or four feet wide, and made of boards

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from six to eight inches in width laid lengthwise with the street. At the place where the plaintiff was injured the outer plank had been removed, leaving a hole from ten to twenty inches beneath. The plaintiff, while walking on the boards at night when it was quite dark, stepped into the hole, his foot caught under the exposed stringer, and in the fall his leg was broken.

1. The amended petition states that the defendant is a corporation, created and organized under the provisions of article 5, of chapter 83, Revised Statutes. The sufficiency of this allegation is challenged by a motion in arrest. The statute pleaded relates to cities of the fourth class. It was not necessary to plead the preliminary steps by which the city became organized under that statute. The general allegation, as made in the amended petition, is sufficient, no matter how or at what stage of the suit the question is raised. Bliss Code Plead., sec. 260. But conceding all this, it is then insisted that there was no proof to support the allegation as to plaintiff's corporate existence. The defendant appeared and answered by way of a general denial, and further stated that the sidewalk complained of was located in a part of the city of Edina where there was but little travel; that defendant's officers had no notice of its defective character; that the same was in a reasonably safe condition; and that defendant was injured by reason of his own negligence. A private corporation, by appearing and defending in the corporate name, admits its corporate existence. *Seaton v. Railroad*, 55 Mo. 416; *Witthouse v. Railroad*, 64 Mo. 523. Where a public municipal corporation appears and makes an affirmative defence, based upon the fact that it is a corporation, we see no reason why the general rule as to private corporations should not be applied. Besides this the mayor and other officers testified as to their official capacity; a pamphlet purporting to be the ordi-

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nances of the city was put in evidence. All this was done without question or objection. These ordinances show that the defendant has a mayor, board of aldermen and such other officers as cities of the fourth class have, and the proof was ample, not only that defendant was a municipal corporation, but that it was a city of the fourth class, though better evidence might have been offered if called for.

2. Various witnesses were asked to state, if they knew of their own knowledge, whether or not the sidewalk was in a reasonably safe condition for the traveling public, which questions were excluded. There was no error in this ruling. The questions did no more than call for the opinion of the witnesses. It was entirely proper to put in evidence the facts showing, or tending to show, the condition of the walk, but it was for the jurors, not the witnesses, to determine from these facts whether under all the circumstances the walk was in a reasonably safe condition. To allow such questions to be answered would be to take the case from the jurors and submit it to the witnesses. *Gavisk v. Railroad*, 49 Mo. 274.

3. It is contended the case was tried upon the theory that no notice of the defect to defendant's officers was required to be shown; but we do not so understand the record. A witness for defendant on cross-examination said: "I was a member of the board of aldermen, and I was on the sidewalk committee. The sidewalk was just six inches narrower where the piece of board was off. There was six or seven feet of space between where the sidewalk ended and the street crossing that had no sidewalk whatever. * * * The sidewalk was in that condition all the time before Mr. Eubank got hurt and I knew it for six or twelve months before Eubank got hurt." There was other evidence tending to show that the board had been off for months.

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On this evidence the court gave the following instruction:

"If the jury believe from the evidence in the cause that the sidewalk in which the defect is alleged to have been and where the plaintiff is alleged to have been injured, was properly or safely constructed and laid down, and that prior and up to about the time of the alleged injury it appeared to be in a proper and safe condition, then if the evidence does not show that the defendant had actual knowledge of such defect, or the defect existed for such a length of time before the injury that the defendant, if exercising proper care and diligence, would have known of it, the jury should find a verdict for the defendant."

This instruction fairly enough presented the question of notice of the existence of the defect, and there was certainly evidence upon which to base it. The sidewalk was located at the outskirts of the city, not traveled to any great extent, and the real question in the case was whether it was in a reasonably safe condition for persons traveling thereon. This question was fairly submitted to the jury upon instructions favorable to defendant and of which complaint is not made.

The judgment is affirmed. All concur.

HOWARD V. THE CITY OF ST. LOUIS, *Appellant*.

1. **Scheme and Charter:** INSANE ASYLUM: PAY OF PHYSICIAN: CONTRACT. Plaintiff was, prior to the adoption of the scheme and charter, separating the city from the county of St. Louis, appointed by the county court resident physician of the insane asylum. Pending litigation to determine the question of the adoption of the scheme and charter, the county court commanded plaintiff to obey

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its orders in regard to the management of the asylum, and the mayor of the city of St. Louis ordered him to obey the city authorities in its management, and plaintiff signified his willingness to obey the latter. If the scheme and charter was adopted the asylum fell within the limits and under the jurisdiction and control of the city. Pending this conflict of authority the county court and mayor agreed that plaintiff should remain in the building, but that another should act as resident physician until the determination of the controversy and should continue to so act if the decision was against the adoption of the scheme and charter, but if in favor of its adoption plaintiff should be reinstated. *Held*, that plaintiff was legally in office under the city after receiving the mayor's order; but upon a decision in favor of the adoption of the scheme and charter, he could not recover from the city his salary during the continuation of the agreement, that he was virtually suspended by it and that the mayor had authority to suspend or remove him under section 9, of the scheme and charter, and was justified in so doing in order to avert the serious consequences that might arise from the conflict of authority between the city and the county.

2. — : — : — : — . Plaintiff was entitled to be paid his salary by the city from the date of the mayor's order to the date of the agreement.

Appeal from St. Louis Court of Appeals.

REVERSED.

Leverett Bell for appellant.

This is an action to recover the salary of the plaintiff as physician of the insane asylum for the months of February, March and April, 1877. The agreed case admits that during all of said period, except the last ten days of April, 1877, said position was filled by Dr. Charles W. Stevens, and that said Stevens was paid from the public treasury the salary attached to the office for the time served by him as aforesaid. The plaintiff, therefore, is not entitled to recover for the term during which Dr. Stevens held the office and received the salary. *Westburg*

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v. Kansas City, 64 Mo. 493; *Terhune v. Mayor*, 88 N. Y. 247. It is of no importance whether Dr. Stevens was rightfully or wrongfully in office. The plaintiff was not actually in office during the period mentioned. Another person held the position and received from the public treasury the salary attached to the office. The public cannot rightfully be charged with the payment of a salary to two persons for one office, during the same term of service. The instruction offered by the defendant, limiting the plaintiff's recovery to the ten days of the month of April, 1877, is the law of the case. The judgment should be reversed and a new trial ordered.

T. K. Skinker for respondent.

(1) If Dr. Stevens had been paid by the city for the whole period in dispute, that would not prevent plaintiff's recovery in this action. Scheme and Charter, section 9. It is well settled that the emoluments of office are incident to the title, and not to the usurpation or colorable possession; and the fact that they have been paid to the usurper is no bar to recovery by the person legally entitled to the office in an action against the municipality. *State v. Carr*, 3 Mo. App. 7; *People v. Tieman*, 30 Barb. 195; 8 Abb. Prac. 359; *Dorsey v. Smith*, 28 Cal. 21; *People v. Oulton*, *Ib.* 44; *Carroll v. Sieben-thaler*, 37 Cal. 195; *Memphis v. Woodward*, 12 Heisk. 499; *McCue v. Wapello County*, 56 Iowa, 698, 703; *Auditors v. Benoist*, 20 Mich. 176; dissenting opinion of Cooley, J.; *Matthews v. Supervisors*, 53 Miss. 721. Where a lieutenant-governor has improperly intruded into the governorship and exercised the functions of governor, the latter officer has, in two cases, been allowed to draw the salary, notwithstanding it has already been paid to the former. *State ex rel. Warmoth v. Graham*, 26 La. An. 568; *State ex rel. Crittenden v. Walker*, 78

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Mo. 139, 144. The fact that plaintiff did not actually render any services during most of the period does not deprive him of the right to compensation. He was excused by the express command of the mayor. *O'Leary v. Board of Education*, 93 N. Y. 1, 6; *People v. French*, 43 Am. Rep. 418, note; *Sleigh v. U. S.*, 9 Ct. of Claims, 375. The cases of *Terhune v. The Mayor*, 88 N. Y. 247; and *Westburg v. Kansas City*, 64 Mo. 493, cited by appellant, are clearly distinguishable from the case at bar. (2) Dr. Stevens was, in point of fact, paid by the city only for four days of the time; for the remainder he was paid by the county. The city can, under no rule, avail itself of a payment by the county.

HENRY, C. J.—Prior to the adoption of the scheme and charter by which the city was separated from the county of St. Louis, Howard was appointed by the county court of the county resident physician of the insane asylum. After the vote on the scheme for separation there was a controversy in regard to its adoption, and pending litigation to determine that question the county court of the county, ordered plaintiff to obey its orders in relation to the management of the asylum, and about the same time he was ordered by the mayor of the city to obey the city authorities in its management. If the scheme and charter was adopted the asylum fell within the limits, jurisdiction and control of the city.

The plaintiff, it seems, was loyal to the city, and signified his willingness to obey its authority, and was directed by the mayor to "hold the fort," the county court having prepared to take forcible possession of the asylum, and place Dr. C. W. Stevens in charge as resident physician. Preparations were made on the other side to resist such attempt, and pending these preparations for war, the county court and the mayor of the city had a conference and it was agreed by the belligerents

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that plaintiff might remain in the building, but that Stevens should take charge as resident physician until a judicial determination of the controversy. If the decision should be that the scheme and charter had been adopted plaintiff was to be re-instated as resident physician; otherwise Stevens should continue in the office. The litigation resulted in favor of the scheme and charter. The county paid Stevens his salary for the time he had served, but the city refused to pay plaintiff a salary for the same period of time, and plaintiff sued to recover it, and had a judgment in the circuit court, which was affirmed *pro forma* by the court of appeals, and the case is here on the city's appeal.

Plaintiff was legally in office under the city, after receiving the mayor's order to continue as resident physician, until the armistice and agreement by which he was superceded. He was virtually suspended, and his case is not materially different in principle from that of *Westberg v. The City of Kansas*, 64 Mo. 493. Westberg was legally suspended and claimed his salary for the time he was suspended, but this court held he was not entitled to it. Plaintiff, after the agreement, between the mayor and the county court, remained in the building under the terms of that agreement, but not as resident physician. He was under no obligation to remain there, but merely had permission to do so. He was, in effect, by that agreement, suspended during the litigation then pending in relation to the adoption of the scheme and charter. That he protested against the agreement makes no difference. The mayor had the power to suspend or remove him under section 9, of the scheme. The city was not bound to resort to war and bloodshed to keep the plaintiff in office as resident physician. To avoid the serious consequences which might reasonably have been apprehended from a collision between the authorities of the city and county was a

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sufficient ground for making the agreement and suspending the plaintiff. As a matter of course plaintiff is entitled to his salary to the date of that agreement.

The judgment is reversed and the cause remanded. All concur.

LARIMORE *et al.*, *Plaintiffs in Error*, v. TYLER *et al.*

1. **Contract : CONDITION : PERFORMANCE.** Whenever it appears to have been the intention of the parties to a contract, that the performance of one stipulation should not be a condition precedent to the performance of another, effect will be given to such intention, but where the intention is to rely on previous performance of the stipulation and not on the remedy for non-performance, performance is a condition precedent.
3. **Fraud as to Creditors.** A claim that a contract is fraudulent as to creditors, must come from the latter and not from parties to it.
4. ———. A party to a fraudulent conveyance cannot allege its illegality to avoid its effect.

Appeal from Callaway Circuit Court.—HON. G. H. BURCKHART, Judge.

AFFIRMED.

Crews & Thurmond and *J. A. Hockaday* for plaintiffs in error.

(1) The contract upon which defendants base their title is an executory one, and before they can recover they must show performance on their part of all they agreed to do under its provisions. *Ingle v. Jones*, 2 Wall. 1; *Busch v. Sander*, 37 Mo. 104; 1 Chitty on Pleading, 323; *Chouteau v. Russell*, 4 Mo. 553; Story on Con-

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tracts, secs. 27, 30, 32; *Bayse v. Ambrose*, 32 Mo. 484; *Earp v. Tyler*, 73 Mo. 617. (2) There were no equities created between the parties; the contract embraced but a single transaction in regard to specific land and was by its terms one and indivisible, so that it does not come within the rule, that, when part of the covenants of a contract have been kept and others have failed, the contract may still be enforced. 2 Sudg. Vend. 395; *Hipwell v. Knight*, 1 Y. & C. 415; *Helm v. Wilson*, 4 Mo. 41. (3) Time was of the essence of the contract. 2 Parsons on Contracts, 383-6. (4) The contract should have been declared void because it shows on its face that it was its purpose to hinder, etc., creditors in sixth class of Henry Larimore, deceased, from subjecting the surplus, after paying the mortgage debts and debts allowed in the fifth class, to the payment of their debts. It further shows that part of such surplus was to enure to the benefit of the grantors and was void and illegal for that reason. *Biglow v. Stringer*, 40 Mo. 195; *Robinson v. Robards*, 15 Mo. 459; *Gates v. Lebaum*, 19 Mo. 17; *Potter v. McDowell*, 31 Mo. 62; *State, etc., v. Benoist*, 37 Mo. 500. (5) The contract is void, as against public policy, in that, it is an agreement upon the part of the administratrix and heirs of an estate to appropriate its assets to their own purposes in disregard of the statutory duties imposed by the administration act and in fraud of the rights of creditors. Story on Con., sec. 578; 1 Addison on Con., secs. 259, 265; 2 Kent Com. 620.

I. W. Boulware and Macfarlane & Trimble for defendants in error.

(1) The contract is supported by a good and valuable consideration. No fraud was intended or resulted therefrom, and it is binding on the parties. (2) Time was not of the essence of the contract; that all the lands should be bought at trustee's sale on December 1, 1880.

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or any other special day, was not essential or material. *Clute v. Jones*, 28 N. Y. 280; *Melton v. Smith*, 65 Mo. 315; *Parsons on Contracts* [5 Ed.] 383-4; *Taylor v. Langworth*, 14 Pet. 173. (3) Defendants not purchasing the whole of the lands on December 1, 1880, did not destroy or render the contract invalid. *Bishop on Con.*, sec. 7526, and note; *Parsons on Con.* [5 Ed.] 383; *Hall v. Pelaplaine*, 5 Wis. 206; *Hill v. Fisher*, 34 Me. 143; *McGuffin v. Grady*, 1 Duval, 95. (5) After Tyler and Baker had obtained the eighteen thousand dollars, bought about five hundred acres of the land at trustee's sale, paid eleven thousand dollars therefor and received deed for same, it was then too late to repudiate and try to rescind the contract. *Addison on Contracts* [3 Am. Ed.] 452, sec. 12, and authorities cited. (6) The neglect, failure, or refusal by one party to fulfill his part of the contract will not release the other party from his engagement, unless such failure and refusal operates as entire frustration of the whole contract. *Bradley v. King*, 44 Ill. 339; *Blood v. Shannon*, 29 Cal. 393; *Swan v. Nichols, adm'r*, 24 Md. 199. (7) No heir, distributee, or creditor was injured or defrauded by the contract. No creditor complains. 24 Miss. 504; 4 Hay, Jenn. R. 44; 33 Me. 17; 7 Blatchford [Md.] 178; 18 Johnson, 407; *Steadman v. Hayes*, 80 Mo. 323. (8) The law will not presume a contract illegal or against public policy, if capable of a construction making it valid. *Curtis v. Gokey*, 68 N. Y. 300; *Missel v. Ins. Co.*, 76 N. Y. 115; *Brooklyn v. Ry.*, 47 N. Y. 119. (9) A deed of gift is not fraudulent *per se*. *Brown's adm'r v. Finlay*, 18 Mo. 378; R. S. sec. 2496. (10) Only creditors can impeach a conveyance, because fraudulent as to them. *Steadman v. Hayes*, 80 Mo. 323; *McLaughlin v. McLaughlin*, 16 Mo. 243; *Zoll v. Soper*, 75 Mo. 462; *George v. Williamson*, 26 Mo. 190. (11) The court did not err in refusing to admit evidence of a fraudulent intent. *Brooks v.*

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Martin, 2 Wall. 78; *Planters Bk. v. Union Bk.*, 16 Wall. 484.

BLACK, J.—This is a suit for the partition of two hundred and eighty acres of land among the widow and heirs of Henry Larimore. He died in 1879, leaving four children; his widow, Jane Larimore, elected to take a child's part. The defendants, Tyler and Baker, the husbands of two of the daughters of Henry Larimore, claim two-fifths of forty acres in their own right, by purchase from Abram and Jane Larimore, and it is this claim alone about which there is any dispute. Some of the debts of Henry Larimore were secured by deeds of trust on personal and real property. After the personal property had been sold and applied, the affairs of the estate were as follows:

The real estate consisted of one thousand three hundred acres of land, one thousand and twenty of which were incumbered by the deeds of trust, upon which there was still due about nine thousand dollars. Other debts, amounting in all to nearly nine thousand dollars, had been allowed against the estate, and of these a debt of two thousand dollars was secured on lands conveyed by the deceased to Abram Larimore. Sales under the deeds of trust were to take place, and the evidence shows that both Jane and Abram were fearful that the one thousand and twenty acres would not sell for enough to pay all the debts, and that it might be necessary to resort to the two hundred and forty acres, and also to the land conveyed to Abram. Thereupon, Jane and Abram, as parties of the first part, and Tyler and Baker, as parties of the second part, made a contract and deed, which recites that the one thousand and twenty acres are to be sold under deeds of trust on the first of December, 1880, and then proceeds as follows:

"Now, therefore, the parties of the first part, in

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consideration of the promises and covenants hereinafter made by the parties of the second part, have released and relinquished, and do hereby release and relinquish all their rights, titles, claims and interests in and to any and all of said lands except as herein provided, and relinquish all their rights and interests in and to all or any part of the money which may arise from the said sale of said land under the trust deed of December 1, 1880, as heirs and widow of the said Henry Larimore, deceased, to the parties of the second part, except that should the debts allowed against the estate of the said Henry Larimore, deceased, and mortgaged debts herein-after mentioned, amount to less than eighteen thousand dollars, the sum specified to be paid for said land at said sale by said parties of the second part, as hereinafter mentioned, then said parties of the first part, as heirs and widow, are to have their proportion of the said eighteen thousand dollars that exceeds the said debts of said estate.

“And in consideration of said covenants and relinquishment, by the parties of the first part, the parties of the second part hereby promise, undertake and agree by bidding on said land at said sale to make said land bring eighteen thousand dollars, or should the mortgaged debts and the debts allowed against said estate exceed eighteen thousand dollars, then said parties of the second part agree to make said land at said sale pay said debts, except as to the Duncan claim, which had been allowed against said estate.

“It is mutually understood and agreed that said parties of the second part are to make said land at said sale bring eighteen thousand dollars, and if the mortgage debts, and the claims allowed against said estate, should be less than eighteen thousand dollars, then the parties of the second part shall pay into the hands of the administratrix the difference between said debts and

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eighteen thousand dollars, but if, on the other hand, the land should bring more than eighteen thousand dollars, then the difference between eighteen thousand dollars and the amount which the land shall bring, or if the said debts (excepting the Duncan debt) shall exceed eighteen thousand dollars, then the difference between the amount of said debts and the amount which said land shall bring at said sale shall not be paid to the administratrix, but shall belong to said parties of the second part and shall be paid to them. It is mutually understood that none of the purchase money, as aforesaid, to be paid for said land at said sale, shall be appropriated to the payment of any claim except the mortgaged debts aforesaid and the debts now allowed against the estate of the said Henry Larimore."

Tyler and Baker bought at the trustee's sale four hundred and seventy acres for eleven thousand dollars, being seventeen hundred dollars more than was due on the deeds of trust; this surplus was paid to the administratrix. Thereafter, and in 1881, they purchased at a sale made by the administratrix, the residue of the one thousand and twenty acres, except the forty here in question, paying therefor thirteen thousand and five hundred dollars. Additional debts were allowed against the estate after the date of the contract; the entire debts have been paid out of the proceeds of these sales, and the time for presenting demands expired before the trial of this cause.

1. The first claim on the part of plaintiff is, that the contract is executory, and that the defendants took and can have nothing by it, because they did not make exact performance of its terms. They did not purchase all the lands at the trustee's sale, for when the trustee had raised money enough to pay the secured debts his power of sale was exhausted. The object of the contract was to make the mortgaged lands pay all the

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debts, secured and unsecured. This the defendants did, to the full extent of their covenants, by purchasing at the sale made by the administratrix. It might well be said the parties must have had these results in contemplation when they made the agreement. For we are not to overlook the substantial purposes had in view. But is the contract an executory one on the part of Abram and Jane Larimore? Whenever it appears to have been the intention of the parties that performance of one stipulation shall not be a condition precedent to the performance of another, effect will be given to such intention; but where the intention is to rely on a previous performance, and not on the remedy for non-performance, performance is a condition precedent. Addison on Con. [Morgan's Ed.] sec. 232. The same principles are asserted in 4 Kent Com. [13 Ed.] 132. By reference to the contract we see Abram and Jane Larimore say they have released and relinquished all their titles, etc., to defendants, except as thereafter provided.

Though various covenants are made with respect to the proceeds of the sale, no reservation whatever is made with respect to their interests in the lands. The instrument is under seal, has the requisites of, and is a deed. The words used are sufficient to convey the rights of the grantors in the lands. By it Abram and Jane evidently intended to, and did make a present conveyance, and relied upon the covenants of the defendants for a remedy. The deed is not upon condition at all. The principles asserted in the cases cited by plaintiffs in error, are not doubted, but they do not apply to this deed. Here the contract was executed when delivered, so far as to be a present conveyance of the interests of Jane and Abram Larimore in the mortgaged lands. Add to these considerations the further fact that defendants have made a substantial performance of all their covenants, and there can be no doubt but they are entitled to the two-fifths of the forty acres acquired from Abram and Jane.

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2. We are not prepared to say the deed and contract, on its face alone, should be held to be fraudulent as against the creditors of the estate of Henry Larimore. The other conceded facts do go far to show the parties designed not only to pay the secured and then allowed demands, but also to cut out certain claims which had not yet been allowed, or presented for allowance. It must be taken that such was the intention of the parties, for other evidence to that end was offered and excluded. Still, does the fact, if proved, defeat the defendants as to the two-fifths of the forty acres in question? This claim that the contract was fraudulent as to creditors, comes from parties to it, and not from any creditor, or any one claiming through a creditor. Where the fraudulent act is not consummated, but rests in a promise, the law permits a party to the contract to interpose and set up the fraud as a defence to any relief on the executory agreement. *Hamilton v. Scull's adm'r*, 25 Mo. 165; *Fenton v. Ham*, 35 Mo. 409. But as was said in the first of these cases, one who has made a fraudulent conveyance of his property, cannot, by alleging his own turpitude, be permitted to set aside his conveyance, and regain the possession of property which he has fraudulently alienated. A party to a fraudulent conveyance cannot allege its illegality for the purpose of avoiding its effect. The law leaves him where he has placed himself. *McLaughlin v. McLaughlin*, 16 Mo. 251; *George v. Williamson*, 26 Mo. 190; *Sleadman v. Hayes*, 80 Mo. 320.

These conclusions lead to an affirmance of the judgment in this case. Affirmed. All concur.

Jaffe v. Krum.

JAFFE, Appellant, v. KRUM, Assignee.

1. **Limited Partnership, LOAN TO BY SPECIAL PARTNER.** An advancement made by a special partner to a limited partnership by way of a loan is within the terms of Revised Statutes, section 3409, which postpones such partner as a creditor where the firm is insolvent, until the other creditors are paid.
2. —. The common law governs limited partnerships where no contrary provision is made by the statute.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Hough, Overall & Judson for appellant.

(1) Revised Statutes, section 3409, clearly refers to the advancement of the limited partner as capital, and not such loans as he may make outside of his advancements as a limited partner. *Clapp v. Lacey*, 35 Conn. 463. (2) The statute is in aid of commerce and should receive a liberal construction. (3) It is of the very essence of limited partnership that the special partner by complying with the law risks nothing but the capital advanced. The attitude occupied by the special partner towards the business more nearly resembles the position at common law of one who contributes to the capital stock by way of the loan of a specific sum as a creditor.

W. B. Douglass and *W. H. Scudder, Jr.*, for respondent.

(1) The object of the statutory provision in question was to prevent special partners from taking advantage of their position to perpetrate frauds on the creditors

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of the firm. *Marshall v. Lambeth*, 7 Rob. 471; *Ames v. Downing*, 1 Bradf. 326; *Jacquin v. Buisson*, 11 How. Pr. 335. (2) The appellant cannot recover in this case; the statutory provision in question applies to the case here presented. *Batchelder v. Altheimer*, 10 Mo. App. 181; *Innes v. Lansing*, 7 Paige, 533; *White v. Hackett*, 20 N. Y. 178; *Dunning's Appeal*, 44 Pa. St. 150; *Mills v. Argall*, 6 Paige, 577, 582; *Hayes v. Heyer*, 35 N. Y. 326; *Hutchinson v. O'Brian*, 5 Leg. & Ins. Rep. 27.

BLACK, J.—The agreed facts show that O. M. Jaffe and William Robertson made a limited partnership under the statute of this state, the business to be conducted under the name of William Robertson, Jaffe being the special partner. All the statutory pre-requisites were complied with. The special partner thereafter advanced to the firm \$15,503.96 as a loan, having previously paid in his entire contribution, as agreed upon in the written partnership agreement. Thereafter the partnership became insolvent, and Robinson, for the firm, made a deed of voluntary assignment. Jaffe, who had his demand allowed by the assignee, now claims to be entitled to share *pro rata* with the other creditors as to his demand arising from the loan. The assignee denied to him this right, and so did the trial court.

The general scope of the statute with respect to limited partnerships is to provide how they may be formed, to exempt the special partner from personal liability for the debts, to deprive him of all power to manage the affairs, and to determine when and under what circumstances he shall be held as a general partner. Section 3409 is as follows: "If the partnership becomes insolvent, no special partner shall be paid as a creditor of the firm, or receive the benefit of any lien in his favor as such until the other creditors of the firm are satisfied."

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The common law determines the rights and liabilities of partners in general, and that law governs in those limited partnerships where no contrary provision is made by the statute. *Marshall v. Lambeth*, 7 Rob. [La.] 471; *Ames v. Downing*, 1 Bradf. 326.

Now, there is no room for doubt as to what the section of the statute above quoted means. In case of insolvency of the partnership it excludes, or rather postpones, the special partner as a creditor, until the other creditors are satisfied. Advances made by him to the partnership by way of a loan are clearly within its terms. It cannot be confined in its operation to the advances made by way of contribution to the capital under the articles of partnership. That would render the section wholly useless, for without it there is nothing in the statute which would permit the special partner to share with the other creditors as to his part of the capital invested. The whole scope of the act is to the effect that he subjects that to the hazards of the enterprise. The law makers have used emphatic language, and we have nothing to do but abide by their words. Other courts have reached the same conclusion upon statutes in substance the same as the one under consideration. *White v. Hackett*, 20 N. Y. 179; *Mills v. Argall*, 6 Paige, 577; *Ward v. Newell*, 42 Barb. 482; *Dunning's Appeal*, 44 Pa. St. 150.

The judgment in this case is affirmed. All concur.

Merz v. Missouri Pacific Railway Company.

MERZ V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

- 1 **Railroads:** CITY OF ST. LOUIS: CHARTER: ORDINANCE. The city of St. Louis has authority under its charter (2 R. S. p. 1585) to enact an ordinance regulating within its limits the speed and operation of cars and locomotives propelled by steam.
2. ———: ———: ———: POLICE POWER. The city in the absence of any express authority in its charter would have the right to pass such ordinance by virtue of its general supervision over the police of the city.
- 3 ———: ———. The ordinance is applicable where the railroad track is located on the unenclosed private property of the company.
4. **Constitution.** Such ordinance is not in conflict with either the state or federal constitution.
5. **Supreme Court:** JURISDICTION: CONSTITUTIONAL QUESTION. Where a cause in which less than twenty-five hundred dollars is involved is appealed to the Supreme Court from the court of appeals because it contains a constitutional question, only such question will be considered on the appeal.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Bennett Pike for appellant.

(1) The court below erred in permitting the plaintiff, against defendant's objections, to read to the jury the ordinance referred to in the petition, to-wit: Ordinance number 10,305, entitled "An ordinance to regulate the speed within the limits of the city of St. Louis of cars and locomotives propelled by steam power;" and also in not giving to the jury at the close of the

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case, defendant's instruction excluding such ordinance from the consideration of the jury, for the reason that said ordinance is unreasonable, unauthorized by any power in the charter of the said city of St. Louis, and is repugnant to the constitution of the state of Missouri and the constitution of the United States. 2 R. S., sec. 23, p. 1585; *City of St. Louis v. Weber*, 44 Mo. 550; *Commonwealth v. Worcester*, 3 Pick. 462-473; *Cooley on Con. Lim.*, sec. 201; *Cooley on Torts*, 286; *Gaines v. Buford*, 1 Dana, 481-490-491; *Hargreaves v. Nickerson*, 25 Mich. 1; *Heeney v. Sprague*, 11 R. I. 456; *County of San Mateo v. Railroad*, 13 Federal Reports, 722.

(2) The demurrer to the evidence at the close of the case should have been sustained, because plaintiff relied solely for his ground of recovery upon the violation of section 2, of ordinance 10,305, entitled "An ordinance to regulate the speed within the limits of the city of St. Louis of cars and locomotives propelled by steam power," which said section is unconstitutional and void. *Cooley's Con. Lim.* [5 Ed]. p. 178, sec. 5, side p. 148; *Mewherter v. Price*, 11 Ind. 199; *Igae v. State*, 14 Ind. 239; *State v. Young*, 47 Ind. 150; *Ryerson v. Utley*, 16 Mich. 269; *People v. Dehaney*, 20 Mich. 349; *Tuscaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Weason v. Lufsley*, 43 Ala. 224; *Jones v. Thompson*, 12 Bush, 394; *Bushing v. Lebre*, 12 Bush, 198; *State v. Kinsella*, 14 Minn. 524; *Cutlip v. Sheriff*, 3 West. Va. 588; *State v. Squires*, 26 Iowa, 340; *State v. Lafayette Co.*, 41 Mo. 39; *State v. Bankers' Ass'n*, 23 Kas. 501; *Failing v. Commissioners*, 53 Barb. 70; *City Kansas v. Payne*, 71 Mo. 159; *Dillon on Municipal Corp.*, secs. 226-246; *Bartlett v. O'Donoghue*, 72 Mo. 563.

F. Gottschalk for respondent.

(1) The city has, under its charter, express power
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to regulate the use of all streets within its limits, to establish and maintain a system of police, etc. (Charter art. 3, sec. 26, sub. 2), and to regulate all vehicles, business, trades and associations. *Ib.*, sub. 5. But it is well settled, both on principle and authority, that the municipal authorities of large towns have the right to adopt such ordinances, as the one cited, by virtue of their general supervision over the police of their respective jurisdictions. *Whitson v. City*, 34 Ind. 396; *Neier v. Railroad*, 12 Mo. App. 25; *Railroad v. City*, 5 Hill, 209 [N. Y.]. 2 Redfield Railways, 578, says: "We should entertain no doubt of the right of the municipal authorities of a city or large town, to adopt such an ordinance, without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdiction." Cooley on Const. Lim. [3 Ed.] 576; Dillon on Mun. Corp. [3 Ed.] secs. 393, 713; *Carroll v. Railroad*, 38 Iowa, 120. (2) The plaintiff does not rely solely upon the provisions of the ordinance for a recovery. The petition alleges that defendant's agents, carelessly, heedlessly, unlawfully and wrongfully operated the locomotive and cars in question. The point made by the appellant, for the first time, in this court, that the ordinance is void because of its defective title, ought not to be noticed for the reason, that it was not made in the trial court nor the court of appeals. In the motion for a new trial, there is not one of the eighteen grounds assigned, which makes this point, although every other conceivable criticism of said ordinance is therein asserted. And see: *In re Burris*, 66 Mo. 446; *State v. Miller*, 45 Mo. 495; *State v. Matthews*, 44 Mo. 523; *City v. Tiefel*, 42 Mo. 598.

NORTON, J.—This suit was brought by plaintiff to recover damages for the loss of the services of his minor child, who was run over by three of defendant's cars being

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operated in the limits of the city of St. Louis, whereby he lost his right arm. He obtained judgment in the circuit court for \$1,703, which was affirmed by the St. Louis court of appeals, and the case is before us on appeal from that judgment.

The appeal being from a judgment for a less sum than twenty-five hundred dollars gives us no jurisdiction of the case unless it appears that it falls within one of the classes of the cases specified in section twelve, article six of the constitution, where an appeal may be taken from the St. Louis court of appeals to this court without reference to the amount in dispute. One of this class is where the case involves a construction of the constitution of this state or of the United States. It is claimed that the case before us falls within that class, in this, that ordinance 10,305 of the city of St. Louis, which was received in evidence over defendant's objection, and upon which plaintiff relied for a recovery, is violative both of the federal and state constitutions.

The only question, therefore, to be considered on this appeal is, whether the city had power to pass the ordinance in question, and whether it is or is not constitutional. So much of it as is necessary to a fair consideration of the points raised by appellant against its validity is as follows :

"An ordinance entitled an ordinance to regulate the speed, within the limits of the city of St. Louis, of cars and locomotives propelled by steam power. Approved January 22, 1877.

"Section 1. It shall not be lawful, within the limits of the city of St. Louis, for any car, cars or locomotives, propelled by steam power, to run at a rate of speed exceeding six miles per hour ; but nothing in this section shall be so construed as to apply to any car, cars, or locomotives, running over the track or tracks which are maintained along the river bank between Arsenal street and Elwood street.

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"Sec. 2. It shall not be lawful, within the limits of the city of St. Louis, for any car, cars, or locomotives, propelled by steam power, to obstruct any street crossing by standing thereon longer than five minutes, and when moving the bell of the engine shall be constantly sounded within said limits, and if any freight car, cars, or locomotives, propelled by steam power, be backing within said limits, a man shall be stationed on the top of the car at the end farthest from the engine to give danger signals, and no freight train shall at any time be moved within the city limits without it be well manned with experienced brakemen at their posts, who shall be so stationed as to see the danger signals and hear the signals from the engine. The steam whistle of danger shall in no case be sounded in giving the usual signal for running trains."

It is insisted that the mayor and assembly had no power to pass the ordinance. By article three, section twenty-six, subdivisions two, five and six, of the charter (2 R. S., p. 1585), express power is given to the city to regulate the use of all its streets, and to regulate all vehicles, business, trades and associations; to declare, abate and prevent nuisances on public or private property, from all which, to pass such an ordinance as the one in question may well be deduced and exercised. But aside from this, in the absence of any express authority by reason of the general supervision over the police which the city has, the authority to pass the ordinance in question may well be derived.

Mr. Dillon (2 Dill. on Mun. Corp., sec. 713), says: "Resulting from the power over streets, and to protect the safety of citizens, and their property, municipal corporations, in the absence of legislative restriction, may control the propelling of cars within their limits, may prohibit the use of steam power, and regulate the rate of speed." In 2 Redfield on Railways, 577-8, it is said: "It has been held, that a statute giving power to the

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common council of a city to regulate the running of cars within the corporate limits, authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city. We should entertain no doubt of the right of the municipal authorities of a city, or large town, to adopt such an ordinance, without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdictions." The doctrine above announced is sustained by the cases of *Buffalo & Niagara Falls Ry. Co. v. City of Buffalo*, 5 Hill [N. Y.] 209; *Whitson v. City of Franklin*, 34 Ind. 393; *Cooley's Con. Lim.* [5 Ed.] 712; *C., B. & Q. Ry. Co. v. Haggarty*, 67 Ill. 113.

It is also insisted that the place where the accident occurred was on the private grounds of defendant, and that to make the ordinance in question apply to it, would be to deprive defendant of the use of its property, and for that reason it is unconstitutional and void. It appears that defendant had two parallel tracks running north and south over a block of ground between Vine and Stein streets in the city; that a switch engine was engaged in switching, and that when it reached the switch in Vine street, which had been set or thrown so as to run the cars on the western track of the two parallel tracks the cars were shunted or kicked from the engine, and ran down on said western track with no one upon them and over plaintiff's son. In the vicinity of the accident a stone quarry was being worked by the lessee of defendant. The block of ground over which the tracks were laid was not enclosed, nor was there anything to indicate that it was the private yard of defendant, and in the disposition of the point now under consideration we adopt what is well said by the court of appeals: "That when a railroad company lays down its tracks in a populous city, not within any enclosure, but on ground open to the public, the mere fact that the rails are not

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laid over a public street or highway, but on private property of the company ought not to be held to relieve it of its obligation to observe all reasonable municipal regulations as to the movement of its trains within the limits of the corporation."

The ordinance in question does not deprive the company of its property without due process of law, nor does it deny to defendant the equal protection of the law, and we are unable to see wherein it is violative of either the state or federal constitution. *Railroad Co. v. Richmond*, 96 U. S. 521.

Having disposed of the constitutional question adversely to the view taken by defendant, and that being the question we are authorized to consider on its appeal, the judgment is affirmed. All concur.

BERGMAN *et al.* v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *Appellant*.

1. **Negligence: RAILROAD TRACK: CITY ORDINANCE.** Notwithstanding a person is guilty of negligence in going on a railroad track without looking or listening for a train, when he could have seen or heard it if he had so looked or listened, still the company will be liable for his death caused by backing its train on him, if it could have avoided the accident by having observed the provisions of an ordinance of the city in which the accident occurred, requiring it to have a man stationed on the end of its train to give danger signals when backing through the city.
2. ——— : ——— : **RECOVERY NOTWITHSTANDING FAILURE TO LOOK AND LISTEN.** While it was negligence on the part of the deceased to go on the track without looking or listening for a train, the railroad is still liable notwithstanding that fact, if it either knew, or might have known, by the exercise of ordinary diligence of the danger of the deceased in time to have prevented the accident.

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3. **Charter of St. Louis City:** ORDINANCE. The provision in the charter of the city of St. Louis that "no bill shall contain more than one subject, which must be clearly expressed in its title," was intended to prevent the practice of joining in the same ordinance incongruous subjects having no relation or connection with each other, and foreign to the subject embraced in the title.
4. ———. It does not prevent uniting in the bill matters germane to the general subject expressed in its title.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Bennett Pike for appellant.

(1) The demurrer to the evidence at the close of plaintiffs' case should have been sustained on the ground of deceased's contributory negligence. *Fletcher v. Ry. Co.*, 64 Mo. 484; *Nelson v. Ry. Co.*, 68 Mo. 593; *Hicks v. Ry. Co.*, 64 Mo. 436; *Harlan v. Ry. Co.*, 65 Mo. 22; *O'Neill v. Ry. Co.*, 45 Iowa, 646; *Ry. Co. v. Patterson*, 93 Ill. 195; *Thomas v. Ry. Co.*, 51 Miss. 637; *Wood v. Ry. Co.*, 70 N. Y. 195; *Ry. Co. v. Hasbun*, 4 Broome, 149; *Runyan v. Ry. Co.*, 1 Dutch. 357; *Ry. Co. v. Still*, 19 Ill. 508; *Ry. Co. v. Heilman*, 49 Pa. 62; *Ry. Co. v. Hunter*, *Adm'r*, 33 Ind. 336; *Drain v. Ry. Co.*, 10 Mo. App. 531; *Ry. Co. v. Houston*, 95 U. S. 697; *Lennix v. Ry. Co.*, 76 Mo. 86; 1 Thompson on Negligence, 426; *Garlon v. Ry. Co.*, 45 N. Y. 662. (2) The demurrer to the evidence should have been sustained, because plaintiffs relied solely for their ground of recovery upon the violation of section two of ordinance number 10,305, entitled, "An ordinance to regulate the speed, within the limits of the city of St. Louis, of cars and locomotives propelled by steam power," which said section is unconstitutional and void. *Cooley's Const. Lim.* [5 Ed.] p. 178, sec. 5, side paging 148; *Mewhater v. Price*, 11 Ind. 199; *Igoe v. State*, 14 Ind. 239; *State v. Young*, 47 Ind. 150; *Ryerson v. Utley*, 16 Mich. 349; *Bridge Co. v.*

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Olmstead, 41 Ala. 9; *People v. Dehaney*, 20 Mich. 349; *Weaver v. Iapsley*, 43 Ala. 224; *Jones v. Thompson*, 12 Bush, 394; *Bushing v. Lebre*, 12 Bush, 198; *State v. Kinsella*, 14 Minn. 524; *Cutlip v. Sheriff*, 3 W. Va. 588; *State v. Squires*, 26 Iowa, 340; *State v. Lafayette Co. Ct.*, 41 Mo. 39; *State v. Bankers' Ass'n*, 23 Kan. 501; *Failing v. Commissioners*, 53 Barb. 70; *City of Kansas v. Payne*, 71 Mo. 159; *Dillon on Mun. Corp.*, secs. 226, 246; *Bartlett v. O'Donoghue*, 72 Mo. 563. (3) The court committed error in refusing to give the instructions asked by defendant, numbered one, two, three, six, eight, and nine. (4) The instructions given by the court on its own motion were erroneous. *Zimmerman v. Ry. Co.*, 71 Mo. 476; *Ry. Co. v. Houston*, 95 U. S. 697.

Louis Gottschalk for respondent.

(1) There was no objection to the introduction of the ordinance number 10,305, which is now attacked for the first time, and, therefore, any objections, even if they existed, are waived. *Dunkman v. Ry. Co.*, 16 Mo. App. 648; *Chaffee v. Ry. Co.*, 64 Mo. 193; *Lohert v. Buchanan*, 50 Mo. 201. But this ordinance is constitutional and complies with the requirements of the charter. *In re Burriss*, 66 Mo. 446; *City v. Tiefel*, 42 Mo. 578; *State v. Matthews*, 44 Mo. 523; *State v. Miller*, 45 Mo. 495; *Cooley on Const. Lim.* [3 Ed.] 200, 576; *Dillon on Mun. Corp.* [3 Ed.] secs. 393, 713. (2) The instructions were correct and the verdict right, and no well founded objections to any evidence were made. *Eckert v. Ry. Co.*, 13 Mo. App. —; *Frick v. Ry. Co.*, 64 Mo.; 75 Mo. 595; *Kelly v. Ry. Co.*, 75 Mo. 138; *Scoville v. Ry. Co.*, 81 Mo. 434; *Welsh v. Jackson*, 81 Mo. 466; *Davis v. Ry. Co.*, 46 Am. Rep. 667; *Barry v. Ry. Co.*, 92 N. Y. 289; *Bennett v. Ry. Co.*, 102 U. S. 577.

NORTON, J.—Plaintiffs brought this suit to recover

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damages for the death of their minor son, Cornelius Bergman, who, it is alleged, was killed by being run over by defendant's cars while walking on Front street, in the city of St. Louis, along which the tracks of defendant's railway run. The defence was contributory negligence. Plaintiffs obtained judgment in the circuit court, which, on appeal to the St. Louis court of appeals, was affirmed *pro forma*, and the cause is before us on defendant's appeal.

At the close of plaintiffs' evidence, defendant asked the court to instruct the jury that, under the pleadings and evidence, plaintiffs were not entitled to recover. The instruction was refused, and this action of the court is assigned as the first ground of error. It appears, from the evidence, that defendant had three tracks along Front street, in the city of St. Louis, between Harney and Bryant streets, and that on the morning plaintiffs' son, who was about eighteen years of age, was run over and killed, he, in company with another youth, was walking on the eastern track in a northwardly direction, when on the approach of a passenger train moving southwardly on the same track, he, with his companion, stepped off the east track on to the middle track, and continued walking northwardly on said track; that when they stepped off the east track on to the middle track, there was a freight train backing up on the middle track consisting of an engine and five or six freight cars, at a distance south of the point where the son of plaintiffs went upon said track, variously estimated by the witnesses to be from one hundred and fifty to six hundred feet. The backing train was moving at three, four, or five miles an hour. The evidence showed that neither of these youths, when they stepped from the eastern to the middle track, listened or looked to see whether any train was on said track approaching from the south, that if they had looked the freight train could have been seen by them. It also shows that after they got on said track they con-

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tinued their walk northward till both were run over and killed by the backing freight train, without looking back, and that if they had looked back they could have seen the train.

It was also shown by plaintiffs' evidence that by an ordinance of said city it is provided that in moving cars in the city limits propelled by steam, the bell of the engine shall be constantly sounded, and that if any freight car or cars, or locomotive propelled by steam be backing within the city limits, a man shall be stationed on the top of the car at the end farthest from the engine to give danger signals, and no freight train shall at any time be moved within the city limits without it be well manned with *experienced* brakemen at their posts, who shall be so stationed as to see the danger signals, and hear the signal from the engine. The evidence of plaintiffs further tended to show that this ordinance was disregarded in two respects, first, in not ringing the bell while the train was in motion; and, second, in not having a man stationed on top of the car farthest from the engine to give danger signals. It further tended to show that at the rate of speed the train was moving it could have been stopped in twenty or twenty-five yards, and that if the ordinance had been complied with in having a brakeman on top of the car, as therein provided, that the dangerous position of plaintiffs' son could have been discovered in time to have avoided the accident and injury. The instruction offered by defendant in the nature of a demurrer to the evidence was properly refused, inasmuch as while it tended to show, and did show, negligence on the part of plaintiffs' son in going upon the track without looking or listening for the train, which he could have seen or heard had he looked or listened, it also tended to show that notwithstanding such negligence the injury to him could have been avoided if the ordinance in evidence had been observed by defendant

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in having a man stationed on top of the car as required by it.

It is, however, insisted that said ordinance is unconstitutional and void, and that for that reason the instruction should have been given. The objection here made was also made to the same ordinance in the case of *Merz v. Railroad*, ante, p. 672, and after a full consideration it was held to be valid, and it is, therefore, unnecessary to re-discuss it.

All the instructions which were given were asked by the defendant, except one, which the court gave of its own motion, and it is unnecessary to notice them further than to say that the issues involved were fairly presented to the jury; and in which they were told that it was negligence on the part of plaintiffs' son to go on the railroad track without looking or listening for the train, and that if they believed he did so, plaintiffs could not recover unless they further believed from the evidence that defendant either knew, or might, by the exercise of ordinary diligence, have known of his dangerous position on the track in time to have prevented the accident. The cause was tried on this theory, and the circuit court was fully justified in so trying it by the rule laid down in the cases of *Kelly v. Railroad*, 75 Mo. 139; *Werner v. Railroad*, 81 Mo. 368; *Scoville v. Railroad*, 81 Mo. 434; *Welsh v. Railroad*, 81 Mo. 466.

It is also insisted that the second section of the ordinance treats of a subject not embraced in the title, and is, therefore, violative of section 13, article 3, of the charter of the city, which provides that "no bill shall contain more than one subject which must be clearly expressed in its title." A similar inhibition is contained in the constitutions of 1865 and 1875, and this court has been repeatedly called upon to construe it with reference to the validity of acts of the legislature, and it has uniformly been held that an act containing a section relating to matters germane to the general subject expressed in

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the title, is not obnoxious to such constitutional inhibition, the object of the inhibition being to prevent the practice of joining in the same bill incongruous subjects having no relation or connection with each other, and foreign to the subject embraced in the title, and that a liberal construction should be placed on the constitutional provision rather than embarrass legislation, by a construction whose strictness is unnecessary to the accomplishment of the beneficial purpose for which it was adopted. *Ewing v. Hoblitzelle*, 85 Mo. 64, and cases cited.

This principle of construction was applied by this court in the case of *State ex rel. v. Mead*, 71 Mo. 266, where it is held that a provision in an act entitled "concerning elections," authorizing the governor to fill vacancies in elective offices, was germane to the general subject and was valid. The title of the ordinance 10,305 in question is as follows: "An ordinance entitled an ordinance to regulate the speed within the city limits of cars and locomotives propelled by steam power." The *subject* expressed in the title is regulating the running of cars and locomotives in the city limits, inasmuch as regulating the speed at which they may be run is a regulation for running them, and the second section of the ordinance hereinbefore quoted, relates to the subject of running trains, and does not embrace matter foreign to it, but matter having a relation to and connection with it.

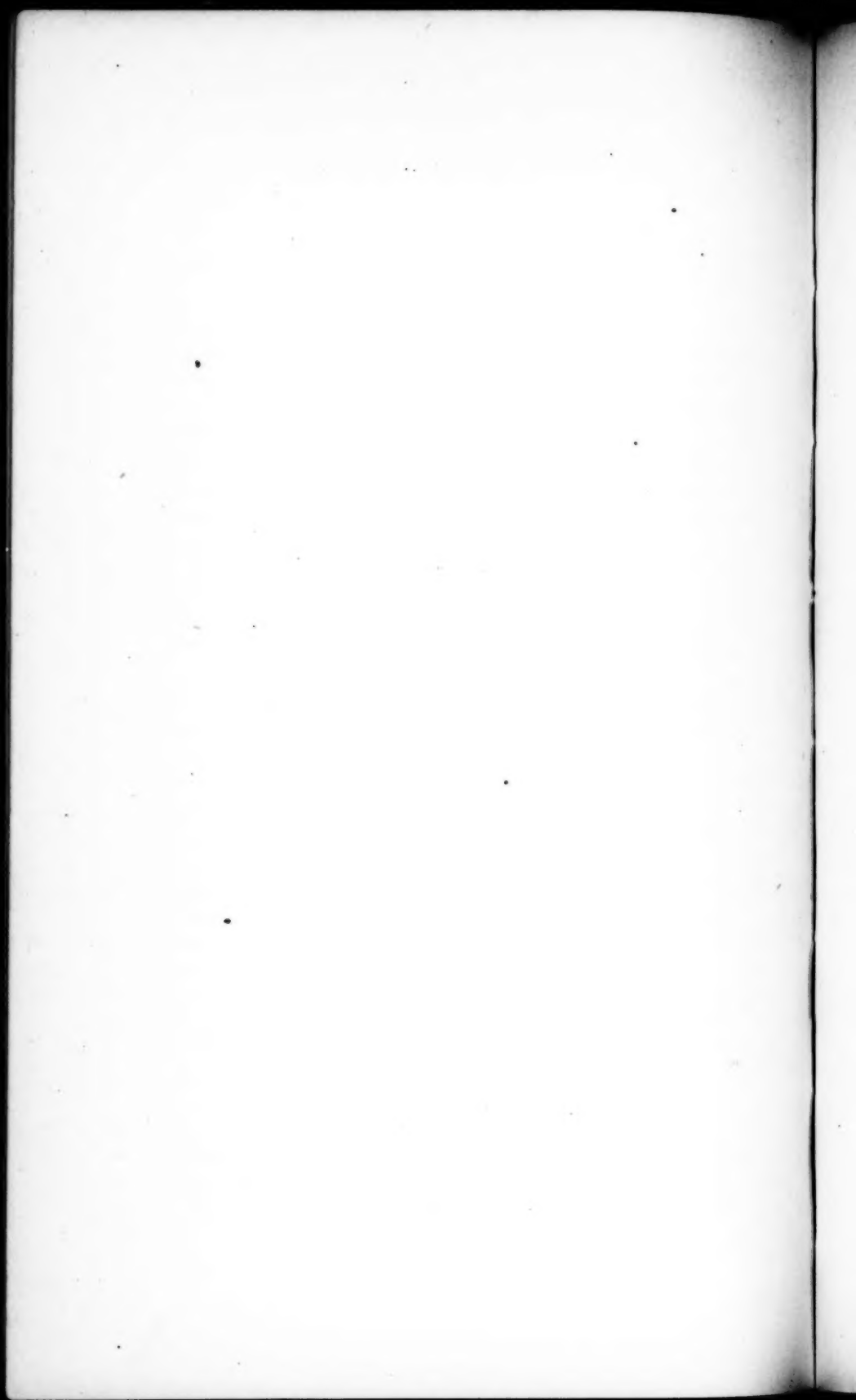
We see no just ground of complaint to the instruction given by the court of its own motion. While subject only to verbal criticism, it is in harmony with those given by the court at defendant's request, and if anything is more favorable to defendant, in this, that it predicates plaintiffs' right to recover on the fact that the death of plaintiffs' son must have been caused solely and directly by the negligence of defendant.

We find no error in the record justifying an inter-

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ference with the judgment and it is hereby affirmed. All concur except Henry, C. J., who dissents.

HENRY, C. J., DISSENTING.—My dissent in this case is based upon the ground that the ordinance in relation to the speed of trains, is violative of the thirteenth section of article three of the charter of the city of St. Louis. It purports to be an ordinance regulating the *speed* of trains; and yet contains provisions which have no relation to the speed, but only to the *equipment* of trains. If it had been entitled an ordinance to regulate *the running of trains*, then provisions with regard to the equipment of trains would have been germane to the subject mentioned in the title. I am unable to perceive the analogy between this case and those of the *State ex rel. Meade*, 71 Mo. 266, and *Ewing v. Hoblitzelle*, 85 Mo. 64.



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3. EVIDENCE : INTERPLEA. On the trial of an interplea issue in an attachment suit, the affidavit for the attachment is not competent evidence against the interpleader. *Ib.*
4. ——— : ———. Nor is it competent on the trial of such interplea to prove the absence of any evidence showing the application of such testimony, that the interpleader and the grantor in the bill of sale, under which the former claimed the property, were members of the same church. *Ib.*
5. OFFICER : ATTACHMENT : PRESUMPTION. Where under a writ of attachment, directing a sheriff to levy on the property of the defendant therein, the officer seizes property in possession of a stranger to the writ, such seizure is *prima facie* wrongful as against such party in possession and in an action therefor by the latter against the officer on his bond, no presumption obtains in favor of the officer that he did his duty in making the levy. *The State ex rel Robertson v. Hope*, 430.
6. ——— : ——— : ———. It is only where the controversy is between the officer and party to the writ that such presumption exists. *Ib.*
7. ——— : ATTACHMENT. That a debtor is about to remove out of the state to change his domicile affords no ground for an attachment of his homestead property. *Davis v. Land*, 436.

ATTORNEY AND CLIENT.

COMPOSITION AGREEMENT: PREFERENCE: KNOWLEDGE OF ATTORNEY, WHEN IMPUTABLE TO PRINCIPAL. An attorney of a debtor, employed to effect a composition with the latter's creditors, gave his personal promise in writing, and afterwards paid to one of the creditors a sum in excess of the amount agreed on and accepted by the other creditors. *Held* (1) That the knowledge of the attorney in the matter of giving such preference was, in law, the knowledge of the principal, and (2) that the failure of the attorney to disclose to another creditor the fact of such preference was the concealment of a material fact and invalidated the composition. *Bank of Commerce v. Hoeber*, 37.

BACK TAXES.

See REVENUE.

BANK.

1. BANK CASHIER, BOND OF: INCREASE OF CAPITAL STOCK OF BANK: SURETIES. The increase of the capital stock of a bank, *held* not to discharge the sureties on the cashier's bond. *Lionberger v. Krieger*, 160.
2. ———: ESTOPPEL. Where the cashier's bond recites that he had been appointed by the board of directors, such recital is conclusive on the sureties. *Ib.*
3. ———. The fact that one was appointed cashier of a bank who was not a director, as required by statute (G. S., p. 365, sec. 3), does not render his bond for his fidelity in office invalid. *Ib.*
4. ———. A bank has the right to require a bond of its cashier although there is no statute requiring it, and the sureties are liable on it as a common law bond. *Ib.*
5. ———. The subsequent enactment of a statute requiring a bond does not affect the validity of such common law bond. *Ib.*
6. BANK: TRUST FUND: RELATION OF CREDITOR AND DEBTOR. The Mastin Bank of Kansas City received a draft on deposit to the credit of the depositors, and thereupon the latter drew their check on the bank, with the request that it should place the proceeds of the same in the Exchange Bank of Denver, Colorado, to the credit of one E, which the Mastin Bank agreed to do. The Exchange Bank was a correspondent of the Mastin Bank, and the latter bank gave the depositors a memorandum addressed to the Exchange Bank, stating that the account of the latter had been credited with the amount of the check to the use of E. The memorandum was at once sent by the depositors to E, and the Mastin Bank also sent a copy of the same by mail to the Exchange Bank, but before it arrived the Mastin Bank had closed its doors and made an assignment for the benefit of its creditors. The Exchange Bank refused

to charge the amount to the Mastin Bank, or to place it to the use of E, or to pay the same to him. *Held*, the Exchange Bank having so refused to accept the credit, the fund remained in the Mastin Bank impressed with the trust, and the relation of general creditors was not created between the depositors and the Mastin Bank. *Stoller v. Coates*, 514.

7. TRUST FUND, CONVERSION OF: PREFERRED DEMAND. The general assets of the Mastin Bank having received the benefit of the unlawful conversion, the bank is chargeable with the amount of the converted fund as a preferred demand. *Ib.*

BILL OF EXCEPTIONS.

1. BILL OF EXCEPTIONS: FILING IN VACATION. An entry of record to the effect that, on motion of defendant, and by consent of plaintiff, leave was given to file the bill of exceptions thirty days after term is sufficient to authorize the filing of the bill. The fact that the court made the order sufficiently shows its consent thereto. *Rine v. The Chicago & Alton Railroad Co.*, 392.
2. PRACTICE IN SUPREME COURT: BILL OF EXCEPTIONS. Where there is no order of the court authenticating the bill of exceptions, the Supreme Court will consider nothing but the record proper. *Roesler v. The Citizens' Bank of Memphis*, 565.

BILLS AND NOTES.

1. PROMISSORY NOTE: HOLDER FOR VALUE. One who takes a note as collateral security for a debt then created is a holder for value. *Deere v. Marsden*, 512.
2. ———: ———. So one will be a holder for value who so takes a note for a pre-existing debt, if there is an express agreement on his part to forbear suit until the collateral shall mature. *Ib.*

BOND.

1. BANK CASHIER, BOND OF: INCREASE OF CAPITAL STOCK OF BANK: SURETIES. The increase of the capital stock of a bank, *held not* to discharge the sureties on the cashier's bond. *Lionberger v. Krieger*, 160.
2. ———: ESTOPPEL. Where the cashier's bond recites that he had been appointed by the board of directors, such recital is conclusive on the sureties. *Ib.*
3. ———. The fact that one was appointed cashier of a bank who was not a director as required by statute (G. S., p. 355, sec. 3), does not render his bond for his fidelity in office invalid. *Ib.*
4. ———. A bank has the right to require a bond of its cashier,

although there is no statute requiring it, and the sureties are liable on it as a common law bond. *Ib.*

5. —. The subsequent enactment of a statute requiring a bond does not affect the validity of such common law bond. *Ib.*

BURDEN OF PROOF.

QUO WARRANTO: OFFICE: BURDEN OF PROOF. In a *quo warranto* proceeding against one for usurping an office, the burden is on the latter to show title thereto. *The State ex rel. Harris v. McCann*, 386.

See FRAUD, 2.

PRACTICE, CIVIL, 23.

BURGLARY.

BURGLARY AND LARCENY: PRACTICE. In a prosecution for burglary and larceny, the defendant may be acquitted of the one and convicted of the other. *The State v. Kennedy*, 341.

CASHIER.

See BANK.

CERTIORARI.

—: PRESUMPTIONS: CERTIORARI. In proceedings by *certiorari*, it will not be presumed from a record which shows merely the removal of an officer that such removal was for cause shown. *The State ex rel. Campbell v. The Board of Police Commissioners of St. Louis*, 144.

CESTUI QUE TRUST.

See TRUSTS AND TRUSTEES, 2.

CHIEF OF POLICE.

See ST. LOUIS, 5.

CLOUD ON TITLE.

See VENDOR AND VENDEE, 3.

COMMON CARRIERS.

COMMON CARRIERS. The undertaking of a common carrier of passengers is to carry the latter without fault or negligence, but the carrier is not an insurer against accidents. *Leslie v. The Wabash, St. Louis & Pacific Railway Co.*, 50.

COMPOSITION.

1. **COMPOSITION AGREEMENT ; PREFERENCE : KNOWLEDGE OF ATTORNEY, WHEN IMPUTABLE TO PRINCIPAL.** An attorney of a debtor, employed to effect a composition with the latter's creditors, gave his personal promise in writing, and afterwards paid to one of the creditors a sum in excess of the amount agreed on and accepted by the other creditors. *Held* (1) That the knowledge of the attorney in the matter of giving such preference was, in law, the knowledge of the principal, and (2) that the failure of the attorney to disclose to another creditor the fact of such preference was the concealment of a material fact and invalidated the composition. *Bank of Commerce v. Hoeber*, 37.
2. **REVISED STATUTES, SECTION 666 : DEBTOR AND CREDITOR : RELEASE OF DEBTOR.** Any creditor of two or more debtors may, under Revised Statutes, section 666, compound with any and every one or more of his debtors for such sum as he may see fit, and release him or them from all further liability for such indebtedness without impairing his right to collect the balance of such indebtedness from the other debtor or debtors not so released : and said section applies to all debts whether evidenced by note or otherwise. But such release does not impair the right of any debtor not so released to have contribution from his co-debtors. *Baker v. Hunt*, 405.
3. ——— : ——— : ———. The releases introduced in evidence in this case held to be a complete defence to the notes sued upon. *Ib.*

CONDITION.

See **DEED**, 18.

CONSIDERATION.

1. **DEED : COLORABLE CONSIDERATION.** A consideration for a conveyance by a debtor wholly disproportionate to the value of the property conveyed and paid to give color to the transaction is not a valuable consideration. *Lionberger v. Baker*, 447.
2. **MARRIAGE.** Marriage is doubtless a valuable, as distinguished from a good consideration. *Ib.*
3. **INNOCENT PURCHASER.** A purchaser from a fraudulent grantee for a valuable consideration without notice takes a good title. *Ib.*

4. VOLUNTARY CONVEYANCE : MARRIAGE : CONSIDERATION. One marrying the grantee in a voluntary conveyance because of its provisions is regarded, it seems, as a purchaser for value. Such, however, is not the case with one who has only contracted or engaged to marry such grantee. *Ib.*

CONSTITUTIONAL LAW.

1. — : CHARTER OF KANSAS CITY : CONSTITUTION. Section 1, article 8, of the charter of the City of Kansas, which provides that "the common council on the petition of residents of Kansas City, who own a majority of the front feet on a street to be graded, may order the same to be graded at the expense of the property owners," is not a discrimination against non-resident owners and for that reason unconstitutional. *Buchan v. Broadwell*, 31.
2. CONSTITUTION. The three years special statute of limitations in reference to tax deeds is constitutional. *Hill v. Atterbury*, 114.
3. — : REVISED STATUTES, SECTION 2121. The second section of the damage act (R. S., sec. 2121) which authorizes the recovery of five thousand dollars in cases of death of persons occasioned by the negligence of railroads, etc., is constitutional. *Carroll v. Missouri Pacific Railway Company*, 239.
4. CONSTRUCTION : STATUTE : CONSTITUTION. Section 1902, of the Revised Statutes, is not unconstitutional upon the ground of being a special law, nor is it unconstitutional because in cities of more than one hundred thousand inhabitants it gives the state a greater number of peremptory challenges than in other localities. *The State v. Hayes*, 344.
5. CONSTITUTION : CONTESTED ELECTION CASES : OPENING BALLOTS. Ballots cast at an election cannot, under the constitution, article 8, sections 3 and 9, be opened and inspected, except in cases of contested elections. *The State ex rel. Ewing v. Francis*, 557.

CONTRACTS.

1. SALE OF LAND : PRIOR EQUITIES. One purchasing land with knowledge of a prior contract as to it, on the part of the vendor, is chargeable with all the equities arising therefrom and affecting the land in the hands of the vendor, and in like manner where a third person claims under a vendee in such contract, he may, upon the payment of the purchase money, or its tender, compel the vendor, or his heirs, or a purchaser with notice, to complete the contract and convey the title. *Hagman v. Shaffner*, 24.
2. EQUITY : CONTRACT. Where reformation and specific performance of deeds and contracts respecting the sale of lands will be decreed by a court of equity between the original parties thereto, similar relief will in general be given in suits between parties claiming under them. *Ib.*

3. COMPOSITION AGREEMENT : PREFERENCE : KNOWLEDGE OF ATTORNEY, WHEN IMPUTABLE TO PRINCIPAL. An attorney of a debtor, employed to effect a composition with the latter's creditors, gave his personal promise in writing, and afterwards paid to one of the creditors a sum in excess of the amount agreed on and accepted by the other creditors. *Held* (1) That the knowledge of the attorney in the matter of giving such preference was, in law, the knowledge of the principal, and (2) that the failure of the attorney to disclose to another creditor the fact of such preference was the concealment of a material fact and invalidated the composition. *Bank of Commerce v. Hoeber*, 37.
4. ——— : CONTRACT. An acceptance of a sum of money due regardless of other stipulations in a contract, will not be regarded as a waiver of such other stipulations. *Ehrlich v. The Aetna Life Insurance Company*, 249.
5. CONTRACT, CONSTRUCTION OF. A stipulation by one in a contract to devote his entire time and energy to the business of an insurance company and to no other, must receive a reasonable interpretation. He is bound to devote his time and energies with that degree of diligence and attention which is usual among industrious business men engaged in like business, and pursuing no other avocation. *Ib.*
6. SERVANT, DISCHARGE OF : ELECTION. Where a servant is wrongfully discharged by his master, he may sue for a breach of the contract, or he may elect to treat the contract as rescinded, and recover on a *quantum meruit* for the services rendered. *Ib.*
7. CONTRACTOR, WHEN PREVENTED FROM COMPLETING WORK : REMEDIES. A contractor who has been prevented by the other party from completing his work, may waive the action for damages and sue for the value of the work done and materials furnished, and he is not in such case restricted to a *pro rata* share of the contract price. *Ib.*
8. QUANTUM MERUIT : PLEADING. It is no objection in such action that the petition sets out the contract and a compliance with its terms, and the termination of the contract by defendant, provided it shows that the plaintiff elects to treat it as canceled and seeks to recover for the services rendered. *Ib.*
9. ——— : ———. Where the petition counts on both the theory of a breach of the contract and a *quantum meruit*, the remedy of the defendant is by motion. *Ib.*
10. CONTRACT : ABANDONMENT. The extension of the time for the completion of a contract to make and place fixtures in a church, and the partial alteration of the work to be done, does not authorize the contractor to abandon the contract and sue for the value of the work. *Haynes v. The Second Baptist Church*, 285.
11. ——— : ACCEPTANCE OF WORK. The use of the church building for

the purposes of construction does not constitute an acceptance of the work or any part of it under the contract for the fixtures, such use being contemplated by the latter contract and the duty to accept the work under it not arising until its completion. *Ib.*

12. CONTRACT TO BUILD HOUSE: ACCIDENTAL DESTRUCTION BY FIRE: CONTRACTOR NOT RELIEVED. Where a contractor undertakes to build a house upon the land of another and before its completion, it is destroyed by fire without his fault, he is not thereby relieved from his obligation to fulfill the contract. The obligation to build not being imposed by law, but arising from his own voluntary contract, its non-performance is not excused by inevitable accident. *Ib.*
13. MARRIED WOMAN: CONTRACT. A married woman who purchases personal property with her own means and on her own credit, can, since the act of 1875 (R. S., sec. 3296) charge it by her note secured by her deed of trust thereon, for the payment of the purchase price. *Daily v. The Singer Manufacturing Co.*, 301.
14. INSURANCE: CHANGE OF POLICY BY PAROL. The terms of an open policy of insurance can be changed by a subsequent parol agreement between the contracting parties. *Day v. The Mechanics' & Traders' Insurance Co.*, 325.
15. ———: ———. By the terms of an open policy of insurance, before an insurance of the property could be effected under it, an indorsement by the authorized agent of the insurer was required to be made either on the policy, or a book attached thereto, or the issuance of a certificate by an agent and signed by an officer of the company was necessary; *held*, that after the delivery of the policy it could be so modified by parol by agreement of the parties as to enable the policy holder to effect his insurance on shipments of property by him, by notice directed to the company's agent and deposited in the mail. *Ib.*
16. ———: ———. The policy contained the following provision: "The use of general terms or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein contained;" *held*, that said clause did not apply to and prohibit the modification of the terms of the policy above mentioned. *Ib.*
17. INSURER: ACTS OF AGENTS. The authority of the agents of the insurance company to consent to the modification of the terms of the policy may be inferred from the course of dealing with the insured and the recognition of these acts by the company. *Ib.*
18. CONTRACT FOR SALE OF LAND: SPECIFIC PERFORMANCE: MEMORANDUM. A memorandum of a contract for the sale and conveyance of land, although signed only by the party to be charged, when sufficiently clear and certain in its terms, affords a competent basis for a suit for specific performance. *Mastin v. Grimes*, 478.

19. ——— : ——— : ———. Where the memorandum stated that the residue of the purchase money "is to be paid as soon as abstract to said lots can be examined," the abstract to be furnished by the vendor, the law would imply that after the examination of the abstract, a reasonable time was to be allowed the vendee in which to make the payment. *Ib.*
20. ——— : REASONABLE TIME. What is such reasonable time is dependent on the circumstances of the case and largely on the conduct of the contracting parties. *Ib.*
21. ——— : TIME : WAIVER. Time is not generally deemed in equity to be of the essence of the contract for the sale and conveyance of land. And even if by express terms a day of payment be fixed and time is declared to be of the essence of the contract, still that is no bar to the time of payment being postponed or to its being waived altogether. *Ib.*
22. ——— : ——— : ———. If, after the expiration of the time limited for the performance of the contract, the parties continue to deal together or to treat the contract as still existing, this will amount to a waiver of the element of time. *Ib.*
23. ——— : NOTICE TO COMPLETE CONTRACT. Where either the vendor or the vendee has improperly and unreasonably delayed in complying with the terms of an agreement for the sale and conveyance of land, the other party may by notice fix the time within which the contract may be completed, but such notice must allow a reasonable length of time for the other party to perform his part of the contract, and if it fail in this respect it may be disregarded. *Ib.*
24. ——— : ———. A notice given by the vendor to the vendee to complete the contract within five days held insufficient under the circumstances in this case. *Ib.*
25. VENDOR AND VENDEE : WAIVER. Where it is obvious from the statements of the vendor that he will not fulfill his part of the contract, all necessity of tendering the purchase money and demanding a deed are waived. *Ib.*
26. ——— : CLOUD ON TITLE. Where the delay on the part of the vendee is occasioned by facts which throw a cloud on the title to the land, and which render it suspicious in the minds of reasonable men, and to any considerable extent affect the value of the property, such delay cannot afford the vendor an opportunity to rescind the contract because of the failure of the purchaser to make payment of the purchase money. *Ib.*
27. SPECIFIC PERFORMANCE : ACTION BY VENDEE : DEFENCE. In an action by a vendee for the specific performance of a contract for the sale and conveyance of land, the vendor set up as a defence that the plaintiff for the purpose of preventing a compliance with the terms of the contract on his part, had falsely and fraudulently pretended that defendant's title to the land was imperfect. *Held*, that the

failure of the vendor to rescind the contract and to return or to offer to return the portion of the purchase money which he received was a bar to said defence. *Ib.*

28. PARTY WALL: CONTRACT: EQUITABLE EASEMENT. Where owners of adjoining premises made an agreement under seal for themselves, but not acknowledged and recorded, whereby one was to build a party wall, and the other, when he should use it in the construction of his building, was to pay half the cost of such wall, the effect of such agreement was to create cross-easements as to each owner, and a purchaser of the estate with notice, would take it burdened with the liability to pay one-half the cost of the wall whenever he should avail himself of its benefits. *Sharp v. Cheat-ham*, 498.
29. ———: ———: ———: NOTICE. One purchasing under a quit-claim deed, would not, without actual notice, be bound by such agreement. *Ib.*
30. CONTRACT: PARTY WALL: EQUITABLE EASEMENT: NOTICE. The agreement in this case, by which the owners of adjoining lots bound themselves, their heirs and vendees in relation to a party wall between their respective lots, held (following *Sharp v. Cheat-ham*, ante, p. 498) to create an equitable charge, easement and servitude upon the lot of the defendant, and the agreement being duly executed, acknowledged and recorded affects with notice any one afterward purchasing and subjects him to the equities created by the agreement. *Keating v. Korfhage*, 524.
31. ———: ———: ESTOPPEL. Where a party to a contract to build a party wall, during the time he continued to be the owner of his lot, acquiesced in the construction of the wall, such acquiescence will estop him and any one claiming under him from afterward objecting to the methods whereby and materials with which such wall was constructed. *Ib.*
32. ———: ———. Acquiescence by the owner in a change of materials used in the construction of the wall had the effect to alter the agreement in that particular and rendered it binding upon one who received a conveyance of the lot from him without any consideration. *Ib.*
33. CORPORATIONS: INSURANCE: BONDS OF COMPANY: CONTRACT. Bonds, forming a part of the assets of a life insurance company which is closing up its business and effecting a re-insurance, which are assigned for the protection of sureties upon an indemnifying bond, given by the company re-insuring to that with which it re-insures, under a contract that after the liability of the sureties is at an end, shall be apportioned among the stockholders of the company re-insuring, the bonds, on such apportionment, become the property of the stockholders against all the world, except the creditors of the company. *Heman v. Britton*, 549.
34. CONTRACT: CONDITION: PERFORMANCE. Whenever it appears to have been the intention of the parties to a contract, that the performance of one stipulation should not be a condition precedent to

the performance of another, effect will be given to such intention, but where the intention is to rely on previous performance of the stipulation and not on the remedy for non-performance, performance is a condition precedent. *Larimore v. Tyler*, 661.

CONTRACT TO PLACE FIXTURES IN BUILDING : DESTRUCTION OF BUILDING : CONTRACT, SEVERABLE WHEN. *Haynes v. The Second Baptist Church*, 285.

SCHEME AND CHARTER : INSANE ASYLUM : PAY OF PHYSICIAN : CONTRACT *Howard v. City of St. Louis*, 356.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATIONS

1. CORPORATIONS : INSURANCE : BONDS OF COMPANY ; CONTRACT. Bonds, forming a part of the assets of a life insurance company which is closing up its business and effecting a re-insurance, which are assigned for the protection of sureties upon an indemnifying bond, given by the company re-insuring to that with which it re-insures, under a contract that after the liability of the sureties is at an end, shall be apportioned among the stockholders of the company re-insuring, the bonds, on such apportionment, become the property of the stockholders against all the world, except the creditors of the company. *Heman v. Britton*, 549.
2. ——— : ——— : TRUST : EQUITABLE LIEN. But the assets of the company so received by its stockholders, constitute a trust fund for the payment of the debts of the company, and an equitable lien exists against them in favor of the creditors which may be enforced, as the directors and stockholders of the company re-insuring, and not the creditors, must answer for the failure of the company with which it re-insures to comply with its contract. *Ib.*
3. ——— : ——— : RECEIVER : COSTS AND DEBTS. A receiver of the re-insuring company, appointed upon its being declared insolvent, is entitled to resort to the said bonds so distributed among the stockholders, only so far as necessary to pay the debts and reasonable costs of the receivership, and he is to be charged with all moneys and property in his hands and credited for the allowed demands in favor of creditors paid and to be paid, and reasonable costs of the receivership. *Ib.*
4. CORPORATIONS : STOCK : PRESUMPTIONS. The presumption is that a certificate of stock in the usual form is full paid, and a purchaser who takes it without notice, is not liable to creditors if the company's representations that the stock is full paid are false. *Johnson v. Lullman*, 567.
5. ——— : LIABILITY OF STOCKHOLDERS : SURRENDER OF STOCK. A

stockholder who surrenders unpaid stock to the corporation is not liable thereon to a creditor of the corporation whose demand accrued after the surrender. *Ib.*

COSTS.

PARTITION : COSTS. The proceeds of the sale of one tract of land, sold for the purpose of partition, cannot be applied in payment of fees or costs in proceedings for partition of another tract of land. *Dale v. Dale*, 462.

See CORPORATIONS, 3.

COUNTIES.

NOTICE : ESTOPPEL. Counties are not estopped by the illegal and void acts of their limited statutory agents. *Sturgeon v. Hampton*, 203.

COUNTY COURT.

1. **SALE OF LANDS OF MINOR : JURISDICTION.** Under the revision of 1845 (R. S., 1845, chap. 73, sec. 22), the county court did not have jurisdiction to order the sale of the land of a minor for the purpose of his support and maintenance, but only for the purpose of procuring and completing the education of such minor. *Blackburn v. Bolan*, 80.
2. ——— : **COUNTY COURT : COMMISSIONER.** The county court did not have the power to appoint a commissioner to convey swamp lands, nor could it release a purchaser from the payment of the consideration. *Sturgeon v. Hampton*, 203.
3. **COUNTY COURTS, POWERS OF.** The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law, and when they exceed their statutory authority their acts are void. *Ib.*
4. ——— : **NOTICE.** Persons dealing with such agents are bound to take notice of their powers and authority. *Ib.*
5. ——— : **ESTOPPEL.** Counties are not estopped by the illegal and void acts of their limited statutory agents. *Ib.*

COVENANT.

See DEED, 18.

CRIMINAL LAW.

1. **CRIMINAL PRACTICE : INSTRUCTIONS.** It is the duty of the court to instruct the jury with reference to the evidence in the case and

where the evidence in a criminal trial all tends to prove one offence, instructions should not be given as to a different one. *The State v. Wilson*, 13.

2. ———: ———. The application of the above rule by the trial court in refusing an instruction for murder in the second degree on the trial of one on an indictment for murder in the first degree approved. *Ib.*
3. CRIMINAL LAW: CONSTITUTION: FORMER JEOPARDY. Where a defendant who has been convicted of a criminal offence asks and obtains a new trial, he may again be put on trial upon the same facts before charged against him, and the proceedings had on the first trial will constitute no protection on the second one. *The State v. Patterson*, 88.
4. CRIMINAL PRACTICE: DEFENDANT TESTIFYING, CROSS-EXAMINATION OF. A defendant testifying as a witness on a criminal trial should not be cross-examined by the state as to matters not testified to by him in chief. *Ib.*
5. ———: SEDUCTION OF FEMALE UNDER PROMISE OF MARRIAGE: PRIOR ACTS OF UNCHASTITY OF PROSECUTRIX. On the trial of an indictment, under Revised Statutes, section 1259, for seducing a female under promise of marriage, it is competent for the defendant to show that prior to the time of the alleged seduction, the prosecutrix was guilty of acts of lewdness and unchastity with other men than the defendant. Overruling *The State v. Brassfield*, 81 Mo. 151. *Ib.*
6. CRIMINAL PRACTICE: ARRAIGNMENT OF DEFENDANT. The Supreme Court will reverse a judgment in a criminal case where the record fails to show an arraignment of the defendant. *The State v. Vanhook*, 105.
7. ———: JURORS: STATUTE. The statutory method of summoning, drawing and impanelling jurors, is directory and not mandatory, and if the jurors are qualified to serve as such, and it does not appear that defendant was prejudiced, the judgment will not be reversed at his instance because of irregularity or informality in their selection. *The State v. Matthews*, 121.
8. ———: EVIDENCE. Where it is sought to contradict a witness by the contents of a writing signed by him he should not be asked as to statements which counsel may suggest are contained in such writing, but the instrument itself should be read in evidence. *Ib.*
9. ———: ———. A judgment against a defendant will not, however, be reversed for a violation of the foregoing rule, where it does not appear that the defendant was prejudiced thereby. *Ib.*
10. CRIMINAL LAW: EVIDENCE. The judgment reversed because of the improper admission in evidence of the threats and demonstra-

tions of a mob against defendant, occurring shortly after the commission of the homicide for which he was on trial. *The State v. Sneed*, 138.

11. — : DRUNKENNESS. Drunkenness is inadmissible in evidence on a criminal trial either to show that no crime was committed or to reduce its grade. *Ib.*
12. — : LARCENY FROM DWELLING. Larceny committed in a dwelling house is grand larceny without reference to the value of the property stolen. R. S., sec. 1309. *The State v. Kennedy*, 341.
13. — : BURGLARY AND LARCENY : PRACTICE. In a prosecution for burglary and larceny, the defendant may be acquitted of the one and convicted of the other. *Ib.*
14. — : INSTRUCTION : RECENT POSSESSION OF STOLEN PROPERTY : PRESUMPTION. An instruction that one found in the possession of property recently stolen is presumed to be the thief, and if he fails to account for his possession in a manner consistent with his innocence, the presumption becomes conclusive against him, is properly given in a case where there is no evidence as to the good character of the defendant. *Ib.*
15. — : LARCENY : ASPORTATION. In larceny the caption and asportation consist in removing the property alleged to have been stolen from the place where it was before; it need not be taken out of the room and carried away. *The State v. Higgins*, 354.
16. PRACTICE, CRIMINAL : DEFENDANT AS A WITNESS : EVIDENCE. Where the defendant in a criminal cause offers himself as a witness, he is subject to the same rules and tests, and can be impeached in the same manner as any other witness, except that he cannot be cross-examined as to any matter not referred to by him in his examination in chief. *The State v. Palmer*, 568.
17. — : EVIDENCE : MORAL CHARACTER. If the defendant does not offer himself as a witness, the state cannot attack his general moral character, unless he first introduces evidence in his own behalf in that regard. And the state need proceed no further than to elicit from the witness that defendant's general moral character is bad, leaving defendant to cross-examine the witness as to particulars, if he so desires. *Ib.*
18. — : INSTRUCTION. Before the jury are at liberty to disregard the testimony of a witness, they must believe that such witness has wilfully and knowingly sworn falsely to a material fact in the case, and there must be a sufficient basis in the testimony to warrant the giving of an instruction to that effect. *Ib.*
19. — : — : DEFENDANT ACTING ON APPEARANCES. The defendant who acts in self-defence in a moment of apparently impending peril is not required to nicely gauge the proper *quantum* of force necessary to repel the assault of his assailant, but may act upon ap-

pearances and use such force as he had reasonable cause at the time to believe was necessary. *Ib.*

20. ——— : ———. The evidence in this case held sufficient to justify the giving of instructions for murder in the first and second degrees. *Ib.*
21. ——— : ——— : EVIDENCE. The defendant in a criminal case has a right to testify as to the intent with which he acted, and his testimony for the purpose of instructing the jury the jury occupies the same footing as that of any other witness, and where he testifies that he did not intend to kill the deceased, he is entitled to an instruction for a lower grade of homicide than murder in either degree. *Ib.*
22. ——— : INSTRUCTIONS. It is the duty of the trial court in a criminal cause to give all necessary instructions, whether asked to do so or not. *Ib.*
23. PLEADING, CRIMINAL : INDICTMENT : FALSE PRETENSES. An indictment under Revised Statutes, section 1561, for obtaining money by means of a false and fraudulent representation, which follows the form prescribed by that section, is sufficient. *The State v. Bayne*, 604.
24. FALSE PRETENSES : EVIDENCE. The evidence in this case held sufficient to go to the jury and to justify the court in overruling defendant's demurrer thereto. *Ib.*
25. PRACTICE, CRIMINAL : FALSE PRETENSES : EVIDENCE : INTENT. In a prosecution under Revised Statutes, section 1561, for obtaining money by means of a false and fraudulent representation, acts of the defendant similar to the one for which he is being tried, committed near the same time and in the same city, are admissible against him for the purpose of showing the intent with which the act charged was done. (Affirming *State v. Myers*, 82 Mo. 558). *Ib.*
26. LARCENY : RES GESTAE. The *res gestae* in larceny is not restricted to the limited time when the fingers reach out and grasp the article in question. The *quo animo* and all actions and words whereby that is demonstrated form part of the *res gestae*, and thus become admissible in evidence, to explain the character of the act charged to be a crime. *The State v. Gabriel*, 631.
27. ——— : ——— : DECLARATIONS OF THIRD PERSONS. Declarations of a third person are not hearsay, and, therefore, are admissible in evidence, where they are the natural and inartificial concomitants of an act done by him, and are explanatory of such act, and such act is a part of the *res gestae*. *Ib.*
28. ——— : ———. On the trial of an indictment for the larceny of sheep, where the transaction was made up of a variety of incidents extending over a period of several days, and was not at an end until the sheep were branded as his own by the defendant, all acts and words which occurred, or were related during that period of

time, tending to show that defendant branded the sheep by mistake or inadvertence and not with a larcenous motive, were competent evidence in his behalf. *Ib.*

29. CRIMINAL LAW : INFORMATION : AMENDMENT. An information for a criminal offence in a case originating in an inferior court cannot be amended in an appellate court. *The State v. Russell*, 648.

30. — : —. The legislature cannot authorize the institution of a criminal prosecution in any other mode than that prescribed by section twelve of article two of the constitution of 1875, and the word "information," as used in that section, means the common law pleading known by that name. *The State v. Kelm*, 79 Mo. 515. *Ib.*

See PLEADING, CRIMINAL.

PRACTICE, CRIMINAL.

DAMAGES.

1. TELEPHONE POLES : STREET : DAMAGES. The erection and maintenance of telephone poles are a proper use of a street. *Semble*, that the owner of the adjoining premises cannot claim compensation for damages resulting thereto from such user of the street. *The Julia Bulding Ass'n v. The Bell Telephone Company*, 258.

2. — : — : —. In no event would compensation in such case be allowed for speculative or contingent damages. *Ib.*

3. — : — : —. Compensation could, however, be recoverable by the adjoining owner for damages resulting to his property from the unskillful and negligent conduct of the work. *Ib.*

4. EJECTMENT : RENTS AND PROFITS : DAMAGES. In an action of ejectment by one tenant in common against his co-tenant, where plaintiff recovers possession of an undivided one-third of the premises, he is also entitled to recover damages, rents and profits from the date of the ouster, subject to the limitations in section 2252, Revised Statutes. *Falconer v. Roberts*, 574.

5. THE AMOUNT of damages, rents and profits assessed by the court held to be correct under the evidence. *Ib.*

6. MEASURE OF DAMAGES. The measure of damages in ordinary cases where property is not entirely lost or destroyed, or practically so, but is only impaired in value or partially destroyed, by the wrongful act of another, is the difference between the value before the injury and immediately thereafter, and reasonable expenses incurred or value of time spent in reasonable endeavors to preserve or restore the property injured. *Harrison v. Missouri Pacific Railway Company*, 625.

7. RAILROAD : KILLING STOCK : MEASURE OF DAMAGES. The owner of cattle negligently killed by a railroad train can only recover the difference between their value before the injury and immediately thereafter, and it is his duty to use reasonable effort to prevent loss after the injury and reduce, as much as possible, the damage ; and where such cattle are available after the injury, he cannot abandon them and then claim their full value. *Ib.*

DEBTOR AND CREDITOR.

1. DEBT, PARTIAL ASSIGNMENT OF BY CREDITOR. A creditor cannot without the debtor's consent assign a part of a note or other debt. *The Fourth National Bank of St. Louis v. Noonan*, 372.
2. ——— : WAIVER. The debtor may, however, waive his right to object to such partial assignment. *Ib.*
3. REVISED STATUTES, SECTION 666 : DEBTOR AND CREDITOR : RELEASE OF DEBTOR. Any creditor of two or more debtors may, under Revised Statutes, section 666, compound with any and every one or more of his debtors for such sum as he may see fit, and release him or them from all further liability for such indebtedness without impairing his right to collect the balance of such indebtedness from the other debtor or debtors not so released ; and said section applies to all debts whether evidenced by note or otherwise. But such release does not impair the right of any debtor not so released to have contribution from his co-debtors. *Baker v. Hunt*, 405.
4. ——— : ——— : ———. The releases introduced in evidence in this case held to be a complete defence to the notes sued upon. *Ib.*

BANK : TRUST FUND : RELATION OF CREDITOR AND DEBTOR. *Stoller v. Coates*, 514.

DEDICATION.

1. CITY : DEDICATION OF STREET, ACCEPTANCE OF. There can be no dedication of land to a city for a street without an acceptance of the same by it. *The City of St. Louis v. The St. Louis University*, 155.
2. ——— : ———. A city cannot accept the dedication of land outside of its territorial limits for street purposes. *Ib.*

DEED.

1. DEED, CANCELLATION OF FOR FRAUD : EVIDENCE. When a grantor in a deed of land seeks its cancellation and the reinvestiture of title on the ground of fraud or mistake, the *onus* of establishing the same is on such grantor, and before the relief asked for will be given, the fraud or mistake must be established by clear and convincing evidence. *Jackson v. Wood*, 76.
2. TRUSTS : EQUITY : DEED. T, a married woman joined, with her hus-

band in a deed of her land to one W—the conveyance being made in the absence of the grantee and without consulting him and without any consideration therefor. It did not appear from the evidence that the land was her separate estate or that the conveyance was made in trust for T, or that she ever informed W that he was to so hold it in trust. W subsequently sold the land, informing his grantee that the latter could safely purchase from him: *held*, that a court of equity would not regard W's grantee as a trustee for T. *Taylor v. Thompson*, 86.

3. **TAX DEED: RECITALS: STATUTE.** A tax deed held not void on its face, because it recited that the sale was made on the eighth day of October, 1873, which could not have been the first Monday of that month, the time for which the sale was required by statute to be advertised. 2 W. S., p. 1196, sec. 183. *Hill v. Atterbury*, 144.
4. ———: ———: ———. While the statute requires the sales to be advertised for the first Monday in October it provides for adjourned sales and the statutory form prescribed for tax deeds does not require therein a recital of the adjournment of the sales from day to day. It only requires that the day on which the land conveyed is offered for sale shall be recited in the deed. *Ib.*
5. **TAX DEED VALID ON ITS FACE: SPECIAL STATUTE OF LIMITATIONS: EVIDENCE.** The tax deed being valid on its face and having been recorded for more than three years before the bringing of the suit, the special statute of limitations was a complete defence for defendant and evidence was inadmissible to show that there was no assessment or levy of taxes on the land or any judgment therefor for the year for which the land was so sold for taxes. *Ib.*
6. **EVIDENCE: DEED: RECORD COPY: SEAL.** Where in the record copy of a deed offered in evidence the statement of the officer taking the acknowledgment that he affixed his seal appears in the body of his certificate, the presumption arises that his seal was attached thereto, although no written scroll or seal was copied into the record by the officer recording the deed. *Addis v. Graham*, 197.
7. ———: ———. The recorder of deeds is not required to copy the seal of the officer who took the acknowledgment of the deed. *Ib.*
8. **DOWER, INSUFFICIENT RELINQUISHMENT OF.** The insufficiency of the wife's relinquishment of dower contained in the acknowledgment of a deed is immaterial where such question of dower is not involved. *Ib.*
9. **OFFICERS, PRESUMPTIONS AS TO ACTS OF.** Presumptions are in favor of the regularity of the acts of public officers, and this rule applied in this case to officers taking acknowledgment of deeds. *Ib.*
10. **LOST DEEDS: SECONDARY EVIDENCE.** Where diligent search has been made in the proper places for deeds and they cannot be found, secondary evidence of their contents is admissible. *Ib.*

11. CONTENTS OF LOST DEED : PAROL EVIDENCE. Parol evidence is competent to show the contents of a lost or destroyed deed or record. *Ib.*
12. ——— : ———. Where it is sought to show that certain lands were conveyed by such lost deed proof of the declarations of the grantor to that effect is admissible. *Ib.*
13. LOSS OF DEED AND RECORD : TITLE OF GRANTEE. Where a deed is executed, acknowledged and recorded, the loss of the deed and destruction of its record, does not affect the title of the grantee. *Ib.*
14. DEED : DESCRIPTION. General words of description in a deed or other instrument may be modified and restricted by particular words following them. *Guffey v. O'Reiley*, 418.
15. TAX DEED, RECITALS IN. Where it affirmatively appears, from the recitals in a tax deed, that no judgment was rendered against the land sold for taxes and intended to be conveyed by such deed, it is void. *Ib.*
16. TAX DEED, FORM OF. Where the statute requires no form of tax deed, the deed must, nevertheless, be adjusted to the facts of the case, and must contain apt and appropriate recitals in order that it may be *prima facie* evidence of such recitals. The deed must affirmatively show upon its face the amount of taxes, interest and costs due upon each tract. *Ib.*
17. DEED : PRESUMPTION : WAIVER. A clause in a city ordinance, by authority of which a deed to the city for certain wharf premises was made, provided that the deed should be binding on the city as soon as the owners of fifteen hundred feet of the wharf should have executed the deed to the satisfaction of the mayor. *Held*, in ejectment by the city to recover the premises, (1) that in the absence of any evidence to the contrary, it must be presumed that the deed was delivered and signed by the prescribed number of property owners, and (2) that the city having entered upon the performance of the stipulations on its part contained in the deed, waived the stipulation in its favor in the ordinance. *The City of St. Louis v. Wiggins Ferry Co.*, 615.
18. DEED : COVENANT : CONDITION. Whether words amount to a condition or covenant is a matter of construction, and the intention of the parties will control. *Ib.*
19. ———. A deed held not void for uncertainty in the description of the premises conveyed. *Ib.*

DEEDS OF TRUST.

See MORTGAGES AND DEEDS OF TRUST.

DEMURRER.

1. DEMURRER TO EVIDENCE: PRACTICE. A demurrer to the evidence admits every fact which any of the evidence tends to prove and also every fact that the jurors may with propriety infer from the evidence before them. It should be allowed only when the evidence thus considered wholly fails to make proof of some essential averment. *Noeninger v. Vogt*, 589.
2. ——— : ———. Where the evidence tends to support one of the two counts of the petition, the demurrer to the evidence should be overruled. *Ib.*

DESCRIPTION.

DEED : DESCRIPTION. General words of description in a deed or other instrument may be modified and restricted by particular words following them. *Guffey v. O'Reiley*, 418.

DIVORCE.

DIVORCE : APPEAL TO ST. LOUIS COURT OF APPEALS : ALIMONY. An appeal from a decree in a divorce suit to the St. Louis court of appeals invests that court with the jurisdiction to hear and determine the cause solely on the record and it has no authority to make an allowance against the respondent in favor of the appellant for the payment of her attorney's fees and expenses of prosecuting her appeal. *The State ex rel. Clarkson v. The St. Louis Court of Appeals*, 135.

DOWER.

1. DOWER ; STATUTE OF LIMITATIONS. The statute of limitations does not commence to run against a widow's dower until it has been assigned. *Johns v. Fenton*, 64.
2. ——— : STALENESS OF DEMAND. Nor is staleness of demand any defence to an action for admeasurement of dower. *Ib.*
3. DOWER, PAROL ASSIGNMENT OF. Dower may be assigned by parol. *Ib.*
4. DOWER, INSUFFICIENT RELINQUISHMENT OF. The insufficiency of the wife's relinquishment of dower contained in the acknowledgment of a deed is immaterial where such question of dower is not involved. *Addis v. Graham*, 197.

DRAMSHOP.

DRAMSHOP: KEEPING WITHOUT LICENSE. The fact that there may be no tribunal in the city of St. Louis to grant a dramshop license, is

no defence for keeping a dramshop without license in violation of the laws of the state. *The State v. McNeary*, 143.

DRUNKENNESS.

DRUNKENNESS. Drunkenness is inadmissible in evidence on a criminal trial either to show that no crime was committed, or to reduce its grade. *The State v. Sneed*, 135.

EASEMENT.

1. **PARTY WALL: CONTRACT: EQUITABLE EASEMENT.** Where owners of adjoining premises made an agreement under seal for themselves, but not acknowledged and recorded, whereby one was to build a party wall, and the other, when he should use it in the construction of his building, was to pay half the cost of such wall, the effect of such agreement was to create cross-easements as to each owner, and a purchaser of the estate with notice, would take it burdened with the liability to pay one-half the cost of the wall whenever he should avail himself of its benefits. *Sharp v. Cheatham*, 498.
2. ———: ———: ———: **NOTICE.** One purchasing under a quit-claim deed, would not, without actual notice, be bound by such agreement. *Ib.*
3. **CONTRACT: PARTY WALL: EQUITABLE EASEMENT: NOTICE.** The agreement in this case, by which the owners of adjoining lots bound themselves, their heirs and vendees in relation to a party wall between their respective lots, held (following *Sharp v. Cheatham*, ante, p. 498) to create an equitable charge, easement and servitude upon the lot of the defendant, and the agreement being duly executed, acknowledged and recorded affects with notice any one afterward purchasing and subjects him to the equities created by the agreement. *Keating v. Korfhage*, 524.

EJECTMENT.

1. **MORTGAGEE: TRUSTEE: EJECTMENT.** A mortgagee, in the absence of an agreement to the contrary, may maintain ejectment for the mortgaged premises, after breach of the conditions, and so, it seems, may also a trustee in a deed of trust. *Siemers v. Schrader*, 20.
2. **EJECTMENT: CESTUI QUE TRUST.** The *cestui que trust* in a deed of trust to secure the payment of a debt, cannot maintain ejectment after condition broken. *Ib.*
3. ———: **ANSWER: JOINDER OF DEFENCES.** A defendant in ejectment may plead a general denial and rely upon that as a complete defence, and may also, in the same answer, plead and rely upon an equitable defence, but the pleadings should be so framed as to show that both defences are relied on. *Ledbetter v. Ledbetter*, 60.

4. ———: ———. If in pleading his equity the defendant unqualifiedly pleads the legal title or right of possession out of himself and in the plaintiff, the latter will not be required to offer any evidence of his title, especially if he waives damages, rents and profits. *Ib.*
5. ———: PARTIES. In ejectment, a landlord has a right on his motion to be made a co-defendant with his tenant. *Hill v. Atterbury*, 114.
6. TRUSTEE: EJECTMENT. Whether a trustee in a deed of trust in the nature of a mortgage, like a mortgagee, can maintain ejectment not decided. *Davis v. Bessehl*, 439.
7. EJECTMENT BY TENANT IN COMMON: PLEADING. In an action of ejectment by one tenant in common against his co-tenant, under a petition in the ordinary form as prescribed by the statute, a recovery may be had where the proof shows an ouster or act amounting to a total denial of plaintiff's right. *Falconer v. Roberts*, 574.
8. THE EVIDENCE in this case held sufficient to warrant the finding of the trial court that defendant had ousted and excluded plaintiff from the possession of the premises. *Ib.*
9. EJECTMENT: RENTS AND PROFITS: DAMAGES. In an action of ejectment by one tenant in common against his co-tenant, where plaintiff recovers possession of an undivided one-third of the premises, he is also entitled to recover damages, rents and profits from the date of the ouster, subject to the limitations in section 2252, Revised Statutes. *Ib.*
10. THE AMOUNT of damages, rents and profits assessed by the court held to be correct under the evidence. *Ib.*

ELECTIONS.

1. CONSTITUTION: CONTESTED ELECTION CASES: OPENING BALLOTS. Ballots cast at an election cannot, under the constitution, article 8, sections 3 and 9, be opened and inspected, except in cases of contested elections. *The State ex rel. Ewing v. Francis*, 557.
2. QUO WARRANTO. A *quo warranto* proceeding is not a contested election case within the meaning of the constitution, and ballots cannot be inspected therein. *Ib.*
3. ———. A *quo warranto* proceeding adjudges the right to the office to no one; it only determines whether the person exercising it is a usurper and ousts him if the judgment is in favor of the relator. *Ib.*

See PRACTICE, CIVIL, 18.

EQUITY.

1. **EQUITY.** Where reformation and specific performance of deeds and contracts respecting the sale of lands will be decreed by a court of equity between the original parties thereto, similar relief will in general be given in suits between parties claiming under them. *Hagman v. Schaffner*, 24.
2. **SALE OF LAND : PRIOR EQUITIES.** One purchasing land with knowledge of a prior contract as to it, on the part of the vendor, is chargeable with all the equities arising therefrom and affecting the land in the hands of the vendor, and in like manner where a third person claims under a vendee in such contract, he may, upon the payment of the purchase money, or its tender, compel the vendor, or his heirs, or a purchaser with notice, to complete the contract and convey the title. *Ib.*
3. **TRUSTS : EQUITY : DEED.** T, a married woman joined, with her husband in a deed of her land to one W—the conveyance being made in the absence of the grantee and without consulting him and without any consideration therefor. It did not appear from the evidence that the land was her separate estate or that the conveyance was made in trust for T, or that she ever informed W that he was to so hold it in trust. W subsequently sold the land, informing his grantee that the latter could safely purchase from him ; *held*, that a court of equity would not regard W's grantee as a trustee for T. *Taylor v. Thompson*, 86.
4. **EQUITY OF REDEMPTION, HOMESTEAD IN.** A owned as a homestead in the city of St. Louis, property worth \$5,500, on which he had executed a deed of trust to secure a debt for \$3,500. *Held*, he was entitled to a homestead in the equity of redemption. Distinguishing *Casebolt v. Donaldson*, 67 Mo. 308. *The State ex rel. Stigo Iron Store Company v. Mason*, 222.
5. **EQUITABLE ESTOPPEL : PURCHASE OF LAND.** One who has title to land and knows of it, but stands by and allows and encourages another in ignorance of such title, to contract for the purchase of the land from a third person in possession having color of title, will be estopped from setting up his title against the party so purchasing, and whom he has himself assisted in deceiving. *Guffey v. O'Reiley*, 418.
6. — : **EVIDENCE.** Equitable estoppels may be given in evidence and operate as effectually as technical estoppels. *Ib.*
7. **EQUITY : LACHES : LAND AND LAND TITLES.** The plaintiff in this case held to be precluded from successfully invoking equitable interference in behalf of his claim to land, because of the laches of his grantor and the latter's failure to perform his portion of the contract, which was the consideration by which he obtained his title. *Smith v. Washington*, 475.
8. **ADMINISTRATION : FINAL SETTLEMENT : EQUITY : PRACTICE.** It is only upon the ground that there has been a final settlement, bind-

ing and conclusive at law, that a proceeding in a court of chancery can be maintained to set the same aside upon the ground of fraud. And where the petition alleges that the administrator fraudulently failed and refused to publish notice of final settlement, the plaintiffs have no standing in equity, their remedy at law being ample and adequate. *Lenox v. Harrison*, 491.

9. ——— : ——— : EQUITY : LACHES. Equity views with disfavor suits brought after the death of one whose estate is sought to be charged, where the fraud alleged was known before such death, and the suit might have been brought during the lifetime of the party ; and where, without reason, the suit is delayed until after his death, such laches must be held fatal. *Ib.*
10. ARBITRATION : EQUITY : PARTY WALL. The refusal of a husband who is acting for his wife to proceed with an arbitration provided for in a contract for building a party wall and ascertaining the cost of the same, after the proceeding had been instituted and the arbitrators had failed to agree, is sufficient to authorize equitable interposition to ascertain the cost of the wall. *Keating v. Korfhage*, 524.
11. EQUITY : MISTAKE OF LAW. Equity will not afford relief against a mere mistake of law, unmixed with any mistake of fact. *The City of St. Louis v. Priest*, 612.
12. EQUITABLE RELIEF : MISTAKE OF LAW. A mere mistake in a matter purely of law affords no ground for relief in a court of equity. *Norton v. Highlegman*, 621.

EQUITY OF REDEMPTION.

See EQUITY, 4.

ESTOPPEL.

1. ——— : ESTOPPEL. Counties are not estopped by the illegal and void acts of their limited statutory agents. *Sturgeon v. Hampton*, 203.
2. EQUITABLE ESTOPPEL : PURCHASE OF LAND. One who has title to land and knows of it, but stands by and allows and encourages another in ignorance of such title, to contract for the purchase of the land from a third person in possession having color of title, will be estopped from setting up his title against the party so purchasing, and whom he has himself assisted in deceiving. *Guffey v. O'Reiley*, 418.
3. ——— : EVIDENCE. Equitable estoppels may be given in evidence and operate as effectually as technical estoppels. *Ib.*
4. ——— : ——— : ESTOPPEL. Where a party to a contract to build a

party wall, during the time he continued to be the owner of his lot, acquiesced in the construction of the wall, such acquiescence will estop him and any one claiming under him from afterward objecting to the methods whereby and materials with which such wall was constructed. *Keating v. Korfhage*, 524.

5. ———: ———. Acquiescence by the owner in a change of materials used in the construction of the wall had the effect to alter the agreement in that particular and rendered it binding upon one who received a conveyance of the lot from him without any consideration. *Ib.*
6. ESTOPPEL. An estoppel cannot be based upon a void judgment where neither the party setting up the estoppel, nor those under whom he claims, have lost or given up any rights or property by reason of such void judgment. *The City of St. Louis v. Wiggins Ferry Company*, 615.

See BANK, 2.

TRUSTS AND TRUSTEES, 9.

EVIDENCE.

1. SPECIAL TAX BILL: PLEADING: EVIDENCE. The petition in this case, which was a suit to enforce the collection of special tax bills, held good and objections to offers of evidence made at the trial properly overruled. *Buchan v. Broadwell*, 31.
2. DEED, CANCELLATION OF FOR FRAUD: EVIDENCE. When a grantor in a deed of land seeks its cancellation and the reinvestiture of title on the ground of fraud or mistake, the *onus* of establishing the same is on such grantor, and before the relief asked for will be given, the fraud or mistake must be established by clear and convincing evidence. *Jackson v. Wood*, 76.
3. THE EVIDENCE in this case reviewed and held, reversing the judgment of the lower court, that the plaintiff failed to make out her case as required by the above rule. *Ib.*
4. THE EVIDENCE in this case examined and the action of the trial court approved, in dismissing plaintiff's bill, which sought to compel defendant to convey to a corporation formed to buy in lands at tax sales, lands alleged to have been bought for the corporation. *Biser v. Dameron*, 82.
5. CRIMINAL PRACTICE: DEFENDANT TESTIFYING, CROSS-EXAMINATION OF. A defendant testifying as a witness on a criminal trial should not be cross-examined by the state as to matters not testified to by him in chief. *The State v. Patterson*, 88.
6. ———: SEDUCTION OF FEMALE UNDER PROMISE OF MARRIAGE: PRIOR ACTS OF UNCHASTITY OF PROSECUTRIX. On the trial of an indict-

ment, under Revised Statutes, section 1259, for seducing a female under promise of marriage, it is competent for the defendant to show that prior to the time of the alleged seduction, the prosecutrix was guilty of acts of lewdness and unchastity with other men than the defendant. (Overruling *The State v. Brassfield*, 81 Mo. 151). *Ib.*

7. TAX DEED VALID ON ITS FACE : SPECIAL STATUTE OF LIMITATIONS : EVIDENCE. The tax deed being valid on its face and having been recorded for more than three years before the bringing of the suit, the special statute of limitations was a complete defence for defendant and evidence was inadmissible to show that there was no assessment or levy of taxes on the land or any judgment therefor for the year for which the land was so sold for taxes. *Hill v. Atterbury*, 114.
8. — : EVIDENCE. Where it is sought to contradict a witness by the contents of a writing signed by him he should not be asked as to statements which counsel may suggest are contained in such writing, but the instrument itself should be read in evidence. *The State v. Matthews*, 121.
9. — : —. A judgment against a defendant will not, however, be reversed for a violation of the foregoing rule, where it does not appear that the defendant was prejudiced thereby. *Ib.*
10. CRIMINAL LAW : EVIDENCE. The judgment reversed because of the improper admission in evidence of the threats and demonstrations of a mob against defendant, occurring shortly after the commission of the homicide for which he was on trial. *The State v. Sneed*, 135.
11. — : DRUNKENNESS. Drunkenness is inadmissible in evidence on a criminal trial either to show that no crime was committed or to reduce its grade. *Ib.*
12. EVIDENCE : INTERPLEA. On the trial of an interplea issue in an attachment suit, the affidavit for the attachment is not competent evidence against the interpleader. *Albert v. Besel*, 150.
13. — : —. Nor is it competent on the trial of such interplea to prove the absence of any evidence showing the application of such testimony, that the interpleader and the grantor in the bill of sale, under which the former claimed the property, were members of the same church. *Ib.*
14. — : DECLARATIONS OF VENDOR AFTER SALE. Declarations of one after he has parted with the ownership and possession of property and not made in the presence of the vendee, are inadmissible in evidence against the latter. *Ib.*
15. EVIDENCE : DEED : RECORD COPY : SEAL. Where in the record copy of a deed offered in evidence the statement of the officer taking

the acknowledgment that he affixed his seal appears in the body of his certificate, the presumption arises that his seal was attached thereto although no written scroll or seal was copied into the record by the officer recording the deed. *Addis v. Graham*, 197.

16. LOST DEEDS : SECONDARY EVIDENCE. Where diligent search has been made in the proper places for deeds and they cannot be found, secondary evidence of their contents is admissible. *Ib.*
17. RECORD PARTLY DESTROYED : EVIDENCE. Where a record is partly destroyed or lost, the part remaining should be introduced in evidence when it is sought to establish the contents of such record. *Ib.*
18. CONTENTS OF LOST DEED : PAROL EVIDENCE. Parol evidence is competent to show the contents of a lost or destroyed deed or record. *Ib.*
19. ——— : ———. Where it is sought to show that certain lands were conveyed by such lost deed proof of the declarations of the grantor to that effect is admissible. *Ib.*
20. ADMINISTRATION : EVIDENCE. Failure to make, keep and present an account to a person for \$2,500 for services claimed to have been rendered him during two and a half years affords some evidence adverse to such claim when presented for allowance against his estate. *Watkins v. Donnelly*, 322.
21. RAILROADS : PERSONAL INJURIES : EVIDENCE. In an action by a passenger against a railroad company for damages for injuries sustained by the derailment of the latter's train, evidence that defendant, several months after the accident, repaired its road in various places by putting in new rails and ties is inadmissible; and the plaintiff's evidence should be confined to the condition of the road bed at the place of and in the immediate vicinity of the accident at the time it occurred, and he should not be allowed to show that accidents had previously occurred on other parts of defendant's road. *Hipsley v. Kansas City, St. Joseph & Council Bluffs Railroad Company*, 348.
22. ——— : EVIDENCE. Stronger evidence is required of a fraudulent intent on the part of a debtor who has conveyed property as against subsequent creditors, than when the debtor was in failing circumstances and the creditors were existing ones. *Ziekel v. Douglass*, 382.
23. CRIMINAL PRACTICE : EVIDENCE. Where no objection is made nor exception saved to the cross-examination of a defendant in a criminal case, as to matters not testified to in chief, the same is waived. *The State v. Mills*, 417.
24. ——— : EVIDENCE. Equitable estoppels may be given in evidence and operate as effectually as technical estoppels. *Guffey v. O'Reiley*, 418.

25. **TAX SALE, IMPEACHMENT OF VALIDITY OF: EVIDENCE.** The validity of a sale of land for taxes may be contradicted by showing any substantial non-compliance with the revenue act, and all books, papers and records in the county clerk's office, pertaining to the subject of taxation, may be introduced in evidence for that purpose. Wag. Stat., sec. 211, p. 1204; *Ewart v. Davis*, 76 Mo. 129. *Howard v. Heck*, 456.
26. **FRAUD: EVIDENCE.** A plaintiff will not be permitted to recover in an action based on the alleged fraud and corrupt agreement of defendant's intestate on evidence circumstantial in kind and of a vague and indefinite character, when by his own admission he has it in his power to produce positive and direct proof of the facts he alleges. *Bent v. Lewis*, 462.
27. ———: ———. The action of the trial court in this case in permitting plaintiff to withhold such direct and positive evidence, and the name of the person by whom it could be established, held to be erroneous and ground for reversal. *Ib.*
28. ———: ———: **MOTIVE.** Evidence tending to show an absence of motive for fraud, or that no injury resulted from the fraud, even if any were committed, is competent to rebut a charge of fraud. *Lenox v. Harrison*, 491.
29. ———: **FAILURE TO RING BELL AT CROSSING: EVIDENCE.** In an action against a railroad for injuries to plaintiff's team by one of its trains by reason of the failure to ring the bell of the locomotive within eighty rods of the crossing, evidence to show connection between such failure to ring the bell and the injury to the team is irrelevant and unnecessary. *Kelly v. The Chicago & Alton Railroad Co.*, 534.
30. **EVIDENCE: DECLARATIONS OF AGENT.** In such action, a conversation had between a brakeman of the train and plaintiff's driver after the occurrence of the accident and the stopping of the train, in which the driver stated that he was not looking, or listening, or thinking about the train, held inadmissible, following *Adams v. Railway*, 74 Mo. 553. *Ib.*
31. **PRACTICE, CRIMINAL: DEFENDANT AS A WITNESS: EVIDENCE.** Where the defendant in a criminal cause offers himself as a witness, he is subject to the same rules and tests, and can be impeached in the same manner as any other witness, except that he cannot be cross-examined as to any matter not referred to by him in his examination in chief. *The State v. Palmer*, 568.
32. ———: **EVIDENCE: MORAL CHARACTER.** If the defendant does not offer himself as a witness, the state cannot attack his general moral character, unless he first introduces evidence in his own behalf in that regard. And the state need proceed no further than to elicit from the witness that defendant's general moral character is bad, leaving defendant to cross-examine the witness as to particulars, if he so desires. *Ib.*

33. EVIDENCE. Evidence having no bearing on the question at issue should not be admitted. *Frederick v. Allgaier*, 598.
34. FRAUDULENT INTENT: EVIDENCE. A fraudulent intent on the part either of the seller or purchaser need not be proved by direct and positive evidence, but it may be shown from facts and circumstances attending the transaction. *Ib.*
35. ALLEGATA AND PROBATA. While the evidence must correspond with the *allegata*, yet only the substance of the issue need be proved. *Ib.*
36. FALSE PRETENSES: EVIDENCE. The evidence in this case held sufficient to go to the jury and to justify the court in overruling defendant's demurrer thereto. *The State v. Bayne*, 604.
37. PRACTICE, CRIMINAL: FALSE PRETENSES: EVIDENCE: INTENT. In a prosecution under Revised Statutes, section 1561, for obtaining money by means of a false and fraudulent representation, acts of the defendant similar to the one for which he is being tried, committed near the same time and in the same city, are admissible against him for the purpose of showing the intent with which the act charged was done. (Affirming *State v. Myers*, 82 Mo. 558). *Ib.*
38. LARCENY: RES GESTAE. The *res gestae* in larceny is not restricted to the limited time when the fingers reach out and grasp the article in question. The *quo animo* and all actions and words whereby that is demonstrated form part of the *res gestae*, and thus become admissible in evidence, to explain the character of the act charged to be a crime. *The State v. Gabriel*, 631.
39. ———: ———: DECLARATIONS OF THIRD PERSONS. Declarations of a third person are not hearsay, and, therefore, are admissible in evidence, where they are the natural and inartificial concomitants of an act done by him, and are explanatory of such act and such act is a part of the *res gestae*. *Ib.*
40. ———: ———. On the trial of an indictment for the larceny of sheep, where the transaction was made up of a variety of incidents extending over a period of several days, and was not at an end until the sheep were branded as his own by the defendant, all acts and words which occurred, or were related during that period of time, tending to show that defendant branded the sheep by mistake or inadvertence and not with a larcenous motive, were competent evidence in his behalf. *Ib.*
41. WILL, PROBATE OF: RECORD AND JUDICIAL PROCEEDING: ADMISSION OF FOREIGN WILL IN EVIDENCE. The record of the probate of a will is a record and judicial proceeding within the meaning of the act of congress, and it is not necessary to the admission of a foreign will with the probate thereof in evidence, that they should have been recorded in this state. *Drake v. Curtis*, 644.

42. EVIDENCE : DEED BY DEVISEE : IDENTITY OF GRANTOR AND DEVISEE. Where a devisee in a will conveys his interest in the land devised by a name different from that contained in the will, the identity of the grantor with the devisee named in the will should be established to entitle the conveyance to admission in evidence. *Ib.*
43. ——— : EVIDENCE. Where, without question or objection, the mayor and other officers testified as to their official capacity and a pamphlet purporting to be the ordinance of the city was put in evidence showing that defendant has a mayor, alderman and such other officers as cities of the fourth class have, the proof was ample that the defendant was a municipal corporation and a city of the fourth class. *Eubank v. The City of Edina*, 650.
44. DEFECTIVE SIDEWALK : EVIDENCE. In an action against a city for injury from a defective sidewalk it is competent to introduce evidence showing the condition of the walk, but it is for the jurors and not for the witnesses to determine from these facts whether under all the circumstances the walk was in a reasonably safe condition. The witnesses should not be allowed to state if they knew whether the sidewalk was in a reasonably safe condition for the traveling public. *Ib.*

FALSE IMPRISONMENT.

MUNICIPAL CORPORATION : FALSE IMPRISONMENT BY OFFICERS OF, ACTION FOR : PLEADING. A petition in an action against a municipal corporation for false imprisonment by its officers, is fatally defective which fails to state that defendant was arrested for the violation of one of its ordinances, or which omits to set out the cause of said arrest. *Worley v. The Inhabitants of the Town of Columbia*, 106.

FALSE PRETENSES.

1. PLEADING, CRIMINAL : INDICTMENT : FALSE PRETENSES. An indictment, under Revised Statutes, section 1561, for obtaining money by means of a false and fraudulent representation, which follows the form prescribed by that section, is sufficient. *The State v. Bayne*, 604.
2. FALSE PRETENSES : EVIDENCE. The evidence in this case held sufficient to go to the jury and to justify the court in overruling defendant's demurrer thereto. *Ib.*
3. PRACTICE, CRIMINAL : FALSE PRETENSES : EVIDENCE : INTENT. In a prosecution under Revised Statutes, section 1561, for obtaining money by means of a false and fraudulent representation, acts of the defendant similar to the one for which he is being tried, committed near the same time and in the same city, are admissible against him for the purpose of showing the intent with which the act charged was done. (Affirming *State v. Myers*, 82 Mo. 558). *Ib.*
4. A SERIES OF INSTRUCTIONS upon the law of obtaining money by

means of false and fraudulent representations examined and approved. *Ib.*

FEES.

FEES IN CASES OF FELONIES: STATUTE: CITY OF ST. LOUIS. fees collected from the state by the clerk of the criminal court of the city of St. Louis, in cases of felonies and not called for by the persons entitled to them, should, under Revised Statutes, sections 5633 to 5639, be paid into the city treasury. *The City of St. Louis v. Clabby*, 573.

FELLOW SERVANT.

See MASTER AND SERVANT.

FIXTURES.

CONTRACT TO PLACE FIXTURES IN BUILDING: DESTRUCTION OF BUILDING: CONTRACT, SEVERABLE WHEN. *Haynes v. The Second Baptist Church*, 285.

FRAUD.

1. **THE FINDING AND DECREE** of the lower court setting aside a conveyance as being in fraud of creditors reversed because not supported by the evidence. *Caldwell v. Smith*, 44.
2. **FRAUD: BURDEN OF PROOF.** Where a bill of sale to one is regular on its face and he is possessive of the property purported to be transferred by it, the burden of proof is on him who assails it in an attachment suit, to show that the transaction was fraudulent, and this is true although the party claiming under the bill of sale may have averred in his interplea that the sale was in good faith. *Albert v. Besel*, 150.
3. **HOMESTEAD, CONVEYANCE OF.** No fraud can be perpetrated on creditors by any disposition a debtor may make of his homestead. *Davis v. Land*, 436.
4. **FRAUD: EVIDENCE.** A plaintiff will not be permitted to recover in an action based on the alleged fraud and corrupt agreement of defendant's intestate on evidence circumstantial in kind and of a vague and indefinite character, when by his own admission he has it in his power to produce positive and direct proof of the facts he alleges. *Bent v. Lewis*, 462.
5. ———: ———. The action of the trial court in this case in permitting plaintiff to withhold such direct and positive evidence, and the name of the person by whom it could be established, held to be erroneous and ground for reversal. *Ib.*

6. ——— : ——— : MOTIVE. Evidence tending to show an absence of motive for fraud, or that no injury resulted from the fraud, even if any were committed, is competent to rebut a charge of fraud. *Lenox v. Harrison*, 491.
7. ——— : PRACTICE. In order to warrant a recovery upon the ground of fraud, there must be a concurrence of both fraud and injury. *Ib.*
8. ——— : ——— : EQUITY : LACHES. Equity views with disfavor suits brought after the death of one whose estate is sought to be charged, where the fraud alleged was known before such death, and the suit might have been brought during the lifetime of the party ; and where, without reason, the suit is delayed until after his death, such laches must be held fatal. *Ib.*
9. SALE : FRAUD ON CREDITORS. A sale of goods is invalid as against creditors where the vendor makes the sale with the intent to hinder, delay or defraud them and the vendee at the time of his purchase knew of such intent of the vendor, and where two instructions were given, one declaring that knowledge of the plaintiff at the time of the purchase, of the intent of the party from whom he bought to hinder, delay, and defraud his creditors, would render the sale void, and the other declaring that the plaintiff ought to recover unless he bought the goods with the intent to hinder, delay, and defraud the creditors of the vendor of the goods ; it was held that such instructions were so plainly repugnant as to render it impossible to tell which the jury took for their guidance, and, therefore, caused their verdict to be mere *guess work*, and that such error was fatal. *Frederick v. Allgaier*, 598.
10. FRAUDULENT INTENT : EVIDENCE. A fraudulent intent on the part either of the seller or purchaser need not be proved by direct and positive evidence, but it may be shown from facts and circumstances attending the transaction. *Ib.*
11. FRAUD AS TO CREDITORS. A claim that a contract is fraudulent as to creditors, must come from the latter and not from parties to it. *Larimore v. Tyler*, 661.
12. ———. A party to a fraudulent conveyance cannot allege its illegality to avoid its effect. *Ib.*

See FRAUDULENT CONVEYANCE.

FRAUDULENT CONVEYANCE.

1. THE FINDING AND DECREE of the lower court setting aside a conveyance as being in fraud of creditors reversed because not supported by the evidence. *Caldwell v. Smith*, 44.
 2. DEED, CANCELLATION OF FOR FRAUD : EVIDENCE. When a grantor
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in a deed of land seeks its cancellation and reinvestiture of title on the ground of fraud or mistake, the *onus* of establishing the same is on such grantor, and before the relief asked for will be given, the fraud or mistake must be established by clear and convincing evidence. *Jackson v. Wood*, 76.

3. SURETY: FRAUDULENT CONVEYANCE. A surety may buy property of his principal to protect himself on his suretyship, and may do this although the purchase may operate to hinder and delay creditors of the principal of their demands, and although the surety knew that the debtor intended the sale to have that effect, *provided* the surety did not participate in the fraudulent purpose of the debtor. *Albert v. Besel*, 150.
4. CONVEYANCE IN FRAUD OF CREDITORS: SPECIAL DEFENCE, WAIVER OF. The objection in an action to set aside a deed because made in fraud of creditors, that the defence that the land conveyed was a homestead of the debtor was not specially pleaded, is waived unless made when the evidence was offered. *Ziekel v. Douglass*, 382.
5. ———: EVIDENCE. Stronger evidence is required of a fraudulent intent on the part of a debtor who has conveyed property as against subsequent creditors, than when the debtor was in failing circumstances and the creditors were existing ones. *Ib.*
6. HOMESTEAD, CONVEYANCE OF. No fraud can be perpetrated on creditors by any disposition a debtor may make of his homestead. *Davis v. Land*, 436.
7. VOLUNTARY CONVEYANCE: FRAUD OF CREDITORS. Where a debtor in embarrassed circumstances, makes a voluntary conveyance and is afterwards unable to meet his debts, existing at the time of the conveyance, in the ordinary course prescribed by law, the conveyance will be void as to such existing debts. *Lionberger v. Baker*, 447.
8. DEED: COLORABLE CONSIDERATION. A consideration for a conveyance by such debtor wholly disproportionate to the value of the property conveyed and paid to give color to the transaction is not a valuable consideration. *Ib.*
9. INNOCENT PURCHASER. A purchaser from a fraudulent grantee for a valuable consideration without notice takes a good title. *Ib.*
10. VOLUNTARY CONVEYANCE: MARRIAGE: CONSIDERATION. One marrying the grantee in a voluntary conveyance because of its provisions is regarded, it seems, as a purchaser for value. Such, however, is not the case with one who has only contracted or engaged to marry such grantee. *Ib.*
11. LIS PENDENS. Where one marries the grantee in such conveyance after a suit has been commenced to set aside the deed because fraudulent as to creditors, he takes subject to the result of the suits. *Ib.*

12. CONVEYANCE IN FRAUD OF CREDITORS: REMEDIES OF CREDITOR. A judgment creditor has the option of either first bringing suit to set aside the fraudulent deed of his debtor and then selling under execution the latter's interest ascertained by the suit, or the creditor may first sell under execution and the purchaser may set aside the fraudulent deed. *Ib.*
13. VENDOR AND VENDEE: FRAUDULENT REPRESENTATIONS. Fraudulent representations by a vendor to the vendee must, in order to set aside the conveyance, be as to a material fact, must be likely to deceive, must have been relied upon, and must have contributed directly to the injury. *Smith v. Dye*, 581.
14. ———: ———. A statement by the vendor, an attorney, that the allowed claim against a receiver, sold by him to another attorney, would be collected, cannot be made the foundation of an action by the latter, where the former stated all the material facts bearing on the claim sold. *Ib.*

See FRAUD, 12.

FRAUDULENT INTENT.

See FRAUD.

FRAUDULENT REPRESENTATIONS.

1. VENDOR AND VENDEE: FRAUDULENT REPRESENTATIONS. Fraudulent representations by a vendor to the vendee must, in order to set aside the conveyance, be as to a material fact, must be likely to deceive, must have been relied upon, and must have contributed directly to the injury. *Smith v. Dye*, 581.
2. ———: ———. A statement by the vendor, an attorney, that the allowed claim against a receiver, sold by him to another attorney, would be collected, cannot be made the foundation of an action by the latter, where the former stated all the material facts bearing on the claim sold. *Ib.*

HOMESTEADS AND EXEMPTIONS.

1. EQUITY OF REDEMPTION, HOMESTEAD IN. A owned as a homestead in the city of St. Louis, property worth \$5,500, on which he had executed a deed of trust to secure a debt for \$3,500. *Held*, he was entitled to a homestead in the equity of redemption. Distinguishing *Casebolt v. Donaldson*, 67 Mo. 308. *The State ex rel. Sligo Iron Store Company v. Mason*, 222.
2. HOMESTEAD, CONVEYANCE OF. No fraud can be perpetrated on creditors by any disposition a debtor may make of his homestead. *Davis v. Land*, 436.

3. ——— : ATTACHMENT. That a debtor is about to remove out of the state to change his domicil, affords no ground for an attachment of his homestead property. *Ib.*

HOTCHPOT.

HOTCHPOT : ADVANCEMENT. The doctrine of bringing advancements into hotchpot applies only in cases of intestacy, or where there is a surplus undisposed of by the will. *Turpin v. Turpin*, 337.

HUSBAND AND WIFE.

1. **MARRIED WOMAN : SEPARATE ESTATE.** Where land or other property is purchased by a husband with the proceeds of his wife's separate estate, it is in equity her separate estate, unless her intention to the contrary is shown, and this is the case although the title was taken in his name. *Martin v. Colburn*, 229.
2. **SEPARATE ESTATE, CONVEYANCE OF.** A wife cannot convey land, although it is her separate estate, without her husband joining in the conveyance. (Black and Sherwood, JJ., dissenting). *Ib.*
3. **MARRIED WOMAN, SEPARATE PROPERTY OF : PRINCIPAL AND AGENT : ACTS OF HUSBAND.** A husband acting in the matter of arbitration proceedings connected with the separate estate of his wife will be regarded as her agent, and she will be considered a *femme sole* with respect to such property. *Keating v. Korfhage*, 524.

IDENTITY.

EVIDENCE : DEED BY DEVISEE : IDENTITY OF GRANTOR AND DEVISER. Where a devisee in a will conveys his interest in the land devised by a name different from that contained in the will, the identity of the grantor with the devisee named in the will should be established to entitle the conveyance to admission in evidence. *Drake v. Curtis*, 644.

INDICTMENT.

See PLEADING, CRIMINAL.

INFORMATION.

See PLEADING, CRIMINAL.

INNOCENT PURCHASER.

INNOCENT PURCHASER. A purchaser from a fraudulent grantee for a valuable consideration, without notice, takes a good title. *Lionberger v. Baker*, 447.

INSANE PERSON.

1. PROCEEDINGS TO ADJUDGE ONE A LUNATIC, NOTICE OF. The notice to one of a proceeding against him in the probate court, to have him adjudged a lunatic and incapable of managing his affairs, corresponds to a summons in an ordinary action, and, like the latter, forms a part of the record proper. *Crow v. Meyersieck*, 411.
2. ———: RECITALS OF RECORD. A recital in the finding and judgment of the court that "due notice" of the proceeding had been given to the alleged insane person is sufficient in the absence of anything to the contrary in the record. But it is competent to contradict such recital by showing by the record that the notice attempted to be given was fatally defective and void. *Ib.*
3. ———: ENTRY OF GENERAL APPEARANCE. But notwithstanding such failure of notice, if the alleged insane person enters a general appearance to the proceeding, a judgment against him will be binding, at least not open to collateral attack. *Ib.*

INSTRUCTIONS.

1. CRIMINAL PRACTICE: INSTRUCTIONS. It is the duty of the court to instruct the jury with reference to the evidence in the case and where the evidence in a criminal trial all tends to prove one offence, instructions should not be given as to a different one. *The State v. Wilson*, 13.
2. ———: ———. The application of the above rule by the trial court in refusing an instruction for murder in the second degree on the trial of one on an indictment for murder in the first degree approved. *Ib.*
3. ———. MURDER: STATUTE: INSTRUCTIONS. Revised Statutes section 1654, provide "that any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide." *Held*, that while on a trial of an indictment for murder in the first degree, it is error to give an instruction on murder in the second degree, where there is no evidence to support it, still giving it is, under said statute, not reversible error. *The State v. Nelson*, 126.
4. INSTRUCTIONS. The proper province of an instruction is to submit questions of fact, not propositions of law. *Albert v. Besel*, 150.
5. ———: NEGLIGENCE. In an action for injuries resulting from the alleged negligence of defendant, and in which the issue of plaintiff's contributory negligence is made, an instruction is erroneous which hypothecates the facts as to defendant's negligence, and authorizes a verdict for plaintiff therein without, in the same instruction, limiting such right of recovery to the ab-

sence of such contributory negligence on the part of plaintiff. *Sullivan v. The Hannibal & St. Joseph Railroad Company*, 169.

6. ———: ———: ———. Such defect in the instruction is not cured by other instructions given in the case which so limit plaintiff's right of recovery if he was guilty of contributory negligence. (Black and Norton, JJ., dissenting.) *Ib.*
7. INSTRUCTION. The assumption in an instruction of the existence of a fact as to which there is no controversy, is no ground for a reversal. *Carroll v. Missouri Pacific Railway Company*, 239.
8. INSTRUCTION: ASSUMPTION OF FACT. The judgment in this case reversed, because of the assumption of a material fact in an instruction given for the plaintiff. *Dowling v. Gerard B. Allen & Co.*, 293.
9. ———: INSTRUCTION: RECENT POSSESSION OF STOLEN PROPERTY: PRESUMPTION. An instruction that one found in the possession of property recently stolen is presumed to be the thief, and if he fails to account for his possession in a manner consistent with his innocence, the presumption becomes conclusive against him, is properly given in a case where there is no evidence as to the good character of the defendant. *The State v. Kennedy*, 341.
10. ———: INSTRUCTION. Before the jury are at liberty to disregard the testimony of a witness, they must believe that such witness has wilfully and knowingly sworn falsely to a material fact in the case, and there must be a sufficient basis in the testimony to warrant the giving of an instruction to that effect. *The State v. Palmer*, 568.
11. ———: ———. The evidence in this case held sufficient to justify the giving of instructions for murder in the first and second degrees. *Ib.*
12. ———: ———: EVIDENCE. The defendant in a criminal case has a right to testify as to the intent with which he acted, and his testimony for the purpose of instructing the jury occupies the same footing as that of any other witness, and where he testifies that he did not intend to kill the deceased, he is entitled to an instruction for a lower grade of homicide than murder in either degree. *Ib.*
13. ———: INSTRUCTIONS. It is the duty of the trial court in a criminal cause to give all necessary instructions, whether asked to do so or not. *Ib.*
14. PRACTICE IN SUPREME COURT: EXCEPTIONS: INSTRUCTIONS. Where no exceptions are saved at the time to the action of the court in refusing instructions, they will not be considered in the appellate court. *The State v. Bayne*, 604.
15. A SERIES OF INSTRUCTIONS upon the law of obtaining money by means of false and fraudulent representations examined and approved. *Ib.*

INSURANCE.

1. **INSURANCE : CHANGE OF POLICY BY PAROL.** The terms of an open policy of insurance can be changed by a subsequent parol agreement between the contracting parties. *Day v. The Mechanics' & Traders' Insurance Company*, 325.
2. — : —. By the terms of an open policy of insurance, before an insurance of the property could be effected under it, an indorsement by the authorized agent of the insurer was required to be made either on the policy, or a book attached thereto, or the issuance of a certificate by an agent and signed by an officer of the company was necessary; *held*, that after the delivery of the policy it could be so modified by parol by agreement of the parties as to enable the policy holder to effect his insurance on shipments of property by him, by notice directed to the company's agent and deposited in the mail. *Ib.*
3. — : —. The policy contained the following provision: "The use of general terms or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein contained;" *held*, that said clause did not apply to and prohibit the modification of the terms of the policy above mentioned. *Ib.*
4. **INSURER : ACTS OF AGENTS.** The authority of the agents of the insurance company to consent to the modification of the terms of the policy may be inferred from the course of dealing with the insured and the recognition of these acts by the company. *Ib.*
5. **CORPORATIONS : INSURANCE : BONDS OF COMPANY : CONTRACT.** Bonds, forming a part of the assets of a life insurance company which is closing up its business and effecting a re-insurance, which are assigned for the protection of sureties upon an indemnifying bond, given by the company re-insuring to that with which it re-insures, under a contract that after the liability of the sureties is at an end, shall be apportioned among the stockholders of the company re-insuring, the bonds, on such apportionment, become the property of the stockholders against all the world, except the creditors of the company. *Heman v. Britton*, 549.
6. — : — : **TRUST : EQUITABLE LIEN.** But the assets of the company so received by its stockholders, constitute a trust fund for the payment of the debts of the company, and an equitable lien exists against them in favor of the creditors which may be enforced, as the directors and stockholders of the company re-insuring, and not the creditors, must answer for the failure of the company with which it re-insures to comply with its contract. *Ib.*
7. — : — : **RECEIVER : COSTS AND DEBTS.** A receiver of the re-insuring company, appointed upon its being declared insolvent, is entitled to resort to the said bonds so distributed among the stockholders, only so far as necessary to pay the debts and reasonable costs of the receivership, and he is to be charged with all

moneys and property in his hands and credited for the allowed demands in favor of creditors paid and to be paid, and reasonable costs of the receivership. *Ib.*

8. **INSURANCE: LIENS: VOLUNTARY PAYMENTS FOR ANOTHER.** Premiums of insurance voluntarily paid on the life of another cannot, in the absence of any understanding, be recovered of the beneficiary, and the person so paying has no lien for such payments, upon the proceeds of the insurance collected by him as the agent of such beneficiary. *Meier v. Meier*, 566.

INTENT

See FALSE PRETENSES, 1

INTENTION.

See DEED, 18

INTEREST.

See JUDGMENTS, 1.

INTERPLEA.

See ATTACHMENT, 2, 3, 4

JEOPARDY.

CRIMINAL LAW: CONSTITUTION: FORMER JEOPARDY. Where a defendant who has been convicted of a criminal offence asks and obtains a new trial, he may again be put on trial upon the same facts before charged against him, and the proceedings had on the first trial will constitute no protection on the second one. *The State v. Patterson*, 88.

JUDGMENTS

1. ———: **JUDGMENT: INTEREST.** A judgment on special tax bills held, under the charter of Kansas City, to properly bear fifteen per cent. interest. *Buchan v. Broadwell*, 31.
2. **PARTITION: FINAL JUDGMENT: APPEAL.** In a partition suit the order of sale is not a final judgment from which an appeal will lie. *Turpin v. Turpin*, 337.
3. **MARRIED WOMAN: JUDGMENT.** A judgment which establishes no personal liability against a married woman, but is special and against her property burdened with an equitable charge and for the enforcement of the same, is not obnoxious to the objection that

it is a judgment against a married woman. *Keating v. Korfhage*, 524.

See INSANE PERSON.

JURISDICTION.

1. SALE OF LANDS OF MINOR : JURISDICTION. Under the revision of 1845 (R. S., 1845, chap. 73, sec. 22) the county court did not have jurisdiction to order the sale of the land of a minor for the purpose of his support and maintenance, but only for the purpose of procuring and completing the education of such minor. *Blackburn v. Bolan*, 80.
2. ——— : ——— : JURISDICTION. Where an order of publication made in term by the court is not published, and instead thereof one made by the clerk is substituted and published, the court will obtain no jurisdiction over the defendants intended to be notified. *Otis v. Epperson*, 131.
3. DIVORCE : APPEAL TO ST. LOUIS COURT OF APPEALS : ALIMONY. An appeal from a decree in a divorce suit to the St. Louis court of appeals invests that court with the jurisdiction to hear and determine the cause solely on the record and it has no authority to make an allowance against the respondent in favor of the appellant for the payment of her attorney's fees and expenses of prosecuting her appeal. *The State ex rel. Clarkson v. The St. Louis Court of Appeals*, 135.
4. APPEAL TO SUPREME COURT : MISDEMEANORS. The Supreme Court has no jurisdiction of appeals from the St. Louis court of appeals in misdemeanor cases. *The State v. McNeary*, 143.
5. ——— : ———. Nor is the jurisdiction maintainable in this case, which was a conviction for keeping a dramshop without license, on the ground that it involved the construction of the revenue laws of the state. *Ib.*
6. PROCEEDINGS TO ESTABLISH PUBLIC ROAD : ACT OF 1868 : JURISDICTIONAL FACTS. Proceedings to establish a public road under the road law of 1868 (Laws, 1868, p. 157) must show that the petition was signed by "twelve householders of the township or townships in which the road is desired, three of whom shall be of the immediate neighborhood," and that the notices of the intended application for the road had been posted for "twenty days prior thereto." These are jurisdictional facts and must appear on the record of the proceeding, otherwise the latter is void; certainly so as against land owners who did not relinquish their rights of way. *Zimmerman v. Snowden*, 218.
7. PRACTICE, CRIMINAL : JURISDICTION : CHANGE OF VENUE. Where the judge of the St. Louis criminal court is disqualified for any of the reasons mentioned in Revised Statutes, section 1877, he is authorized by Revised Statutes, section 1881, to call in the judge of

another circuit to try a defendant's application for a change of venue, and the judge of such other circuit becomes thereby possessed of jurisdiction of the cause until its final determination, notwithstanding the withdrawal of the application by his consent, after the cause has been reversed in the Supreme Court. *The State v. Hayes*, 344.

8. REVENUE: ASSESSOR'S BOOK, VERIFICATION OF: JURISDICTION: TAX SALE. The failure of the county clerk to sign and seal the assessor's book, as required by section 65, page 1171, 2 Wagner's Statutes, renders it of no official validity, and makes the collector's report of the delinquent list to the county court, as provided by section 190, page 1198, 2 Wagner's Statutes, unauthorized and invalid; and the county court, in such case, is without jurisdiction and powerless to act. *Howard v. Heck*, 456.
9. SUPREME COURT: JURISDICTION: CONSTITUTIONAL QUESTION. Where a cause in which less than twenty-five hundred dollars is involved is appealed to the Supreme Court from the court of appeals because it contains a constitutional question, only such question will be considered on the appeal. *Merz v. The Missouri Pacific Railway Company*, 672.

JURORS.

1. CRIMINAL PRACTICE: JURORS: STATUTE. The statutory method of summoning, drawing and impaneling jurors, is directory and not mandatory, and if the jurors are qualified to serve as such, and it does not appear that defendant was prejudiced, the judgment will not be reversed at his instance because of irregularity or informality in their selection. *The State v. Matthews*, 121.
2. ———: OBJECTION TO JUROR. The objection that one of the jurors was not a citizen of the county where the trial was had comes too late under the statute (R. S., sec. 2778) after his acceptance and qualification as a juror. *The State v. Waller*, 402.
3. ———: JURORS. The objection that the jurors who tried the defendant were not of the standing jurors selected by the county court, held not well taken, it not appearing but that such latter jurors were engaged in the trial of other causes. *The State v. Gleason*, 582.
4. ———: ———. The statute with respect to the manner of selecting jurors is directory. *Ib.*
5. ———: ———. The trial court has the right to direct its officers to summon additional jurors or an entire panel as the dispatch of business may demand. *Ib.*

JURY.

See JURORS.

JUSTICES OF THE PEACE.

1. JUSTICES OF THE PEACE, ELECTION OF : REVISED STATUTES, SECTION 2807. The effect of the enactment of Revised Statutes, section 2807, in reference to the election and terms of office of justices of the peace was to supersede and repeal all prior statutes authorizing the election of such officers prior to the general election in November, 1882, and any election so held in contravention of said section of the statute was void. (Re-affirming *The State ex rel v. McCann*, 81 Mo. 479). *The State ex rel. Harris v. McCann*, 386.
2. ———. The appointment and commission of respondent as a justice of the peace by the mayor of the city of St. Louis, held to be of no validity, because there was no vacancy to be filled. *Ib.*
3. QUO WARRANTO : OFFICE : BURDEN OF PROOF. In a *quo warranto* proceeding against one for usurping an office, the burden is on the latter to show title thereto. *Ib.*
4. ——— : RETURN, SUFFICIENCY OF. The return in such proceeding for usurping the office of justice of the peace, is insufficient if it fails to show that the respondent qualified under the appointment by virtue of which he claims the office. *Ib.*

KANSAS CITY.

1. ——— : CHARTER OF KANSAS CITY : CONSTITUTION. Section one, article eight of the charter of the City of Kansas, which provides that "the common council on the petition of residents of Kansas City who own a majority of the front feet on a street to be graded, may order the same to be graded at the expense of the property owners," is not a discrimination against non-resident owners and for that reason unconstitutional. *Buchan v. Broadwell*, 31.
2. ——— : JUDGMENT : INTEREST. A judgment on special tax bills held, under the charter of Kansas City, to properly bear fifteen per cent. interest. *Ib.*

LACHES.

See EQUITY, 7, 9.

LAND AND LAND TITLES.

1. SALE OF LAND : PRIOR EQUITIES. One purchasing land with knowledge of a prior contract as to it, on the part of the vendor, is chargeable with all the equities arising therefrom and affecting the land in the hands of the vendor, and in like manner where a third person claims under a vendee in such contract, he may, upon the payment of the purchase money, or its tender, compel the vendor,

or his heirs, or a purchaser with notice, to complete the contract and convey the title. *Hagman v. Shaffner*, 24.

2. **LOSS OF DEED AND RECORD : TITLE OF GRANTEE.** Where a deed is executed, acknowledged and recorded, the loss of the deed and destruction of its record, does not affect the title of the grantee. *Addis v. Graham*, 197.
3. **SWAMP LANDS, POWER OF COUNTIES OVER : STATUTE.** The amendatory act of the general assembly of 1875 (Laws, p. 32), providing that all lands in this state selected under the act of congress donating swamp lands to the state "be and the same are hereby declared to vest in full title and belong to the counties in which they may lie," did not enlarge the powers of the county courts over the swamp lands. Notwithstanding said act, the counties still held them for the uses and with the power of disposition under the then existing laws. *Sturgeon v. Hampton*, 203.
4. ———. The swamp lands are not the general property of the counties. *Ib.*
5. **SWAMP LANDS, SALES OF : PATENT.** Under the laws (R. S. 1855, p. 1006, secs. 3-4), providing for the sale of swamp lands by sheriffs, under orders of the county courts, patents therefor were to be made by the governor, but not until full payment of the consideration therefor. *Ib.*
6. ——— : ——— : **COMMISSIONER.** The county court did not have the power to appoint a commissioner to convey swamp lands, nor could it release a purchaser from the payment of the consideration. *Ib.*
7. ——— : ———. The swamp land laws provide when and how title thereto is to be made. These statutes are exclusive, and the method thus prescribed must be pursued. *Ib.*
8. **SWAMP LANDS : ACT OF MARCH 26, 1868.** The act of the legislature approved March 26, 1868 (Laws, p. 67), entitled "An act to perfect the title to lands known as swamp lands," was not intended to make valid a void sale or a deed when the purchaser was not entitled to one. *Ib.*
9. **EQUITABLE ESTOPPEL : PURCHASE OF LAND.** One who has title to land and knows of it, but stands by and allows and encourages another in ignorance of such title, to contract for the purchase of the land from a third person in possession having color of title, will be estopped from setting up his title against the party so purchasing, and whom he has himself assisted in deceiving. *Guffey v. O'Reiley*, 418.
10. **EQUITY : LACHES : LAND AND LAND TITLES.** The plaintiff in this case held to be precluded from successfully invoking equitable interference in behalf of his claim to land, because of the laches of his grantor and the latter's failure to perform his portion of the

contract, which was the consideration by which he obtained his title. *Smith v. Washington*, 475.

11. LAND AND LAND TITLES : QUIT CLAIM DEED : AFTER ACQUIRED TITLE. The plaintiff's grantor, claiming title through a quit-claim deed from defendant, held not to be entitled in this case to any title afterwards acquired by the latter. *Ib.*

LARCENY.

1. CRIMINAL LAW : LARCENY FROM DWELLING. Larceny committed in a dwelling house is grand larceny without reference to the value of the property stolen. R. S., sec. 1309. *The State v. Kennedy*, 341.
2. ——— : BURGLARY AND LARCENY : PRACTICE. In a prosecution for burglary and larceny, the defendant may be acquitted of the one and convicted of the other. *Ib.*
3. ——— : INSTRUCTION : RECENT POSSESSION OF STOLEN PROPERTY : PRESUMPTION. An instruction that one found in the possession of property recently stolen is presumed to be the thief, and if he fails to account for his possession in a manner consistent with his innocence, the presumption becomes conclusive against him, is properly given in a case where there is no evidence as to the good character of the defendant. *Ib.*
4. ——— : LARCENY : ASPORTATION. In larceny the caption and asportation consist in removing the property alleged to have been stolen from the place where it was before ; it need not be taken out of the room and carried away. *The State v. Higgins*, 354.
5. LARCENY : RES GESTAE. The *res gestae* in larceny is not restricted to the limited time when the fingers reach out and grasp the article in question. The *quo animo*, and all actions and words whereby that is demonstrated, form part of the *res gestae*, and thus become admissible in evidence to explain the character of the act charged to be a crime. *The State v. Gabriel*, 631.
6. ——— : ——— : DECLARATIONS OF THIRD PERSONS. Declarations of a third person are not hearsay, and, therefore, are admissible in evidence, where they are the natural and inartificial concomitants of an act done by him, and are explanatory of such act, and such act is a part of the *res gestae*. *Ib.*
7. ——— : ———. On the trial of an indictment for the larceny of sheep, where the transaction was made up of a variety of incidents extending over a period of several days, and was not at an end until the sheep were branded as his own by the defendant, all acts and words which occurred, or were related during that period of time, tending to show that defendant branded the sheep by mistake or inadvertence, and not with a larcenous motive, were competent evidence in his behalf. *Ib.*

8. **CRIMINAL PRACTICE : PETIT LARCENY.** It is only where the evidence shows, on a trial for grand larceny, that the value of the property taken would constitute petit larceny that the defendant may be convicted of the latter offence under Revised Statutes, section 1315. *Ib.*

LICENSE.

See **DRAMSHOP.**

LIEN.

See **CORPORATIONS.**

INSURANCE, 8.

LIMITATIONS.

1. **DOWER : STATUTE OF LIMITATIONS.** The statute of limitations does not commence to run against a widow's dower until it has been assigned. *Johns v. Fenton, 64.*
2. **TAX DEED VALID ON ITS FACE : SPECIAL STATUTE OF LIMITATIONS : EVIDENCE.** The tax deed being valid on its face and having been recorded for more than three years before the bringing of the suit, the special statute of limitations was a complete defence for defendant and evidence was inadmissible to show that there was no assessment or levy of taxes on the land or any judgment therefor for the year for which the land was so sold for taxes. *Hill v. Atterbury, 114.*
3. **CONSTITUTION.** The three years special statute of limitations in reference to tax deeds is constitutional. *Ib.*
4. **MORTGAGE : ADVERSE POSSESSION BY MORTGAGEE : LIMITATIONS.** A mortgagee in possession, who for the period of limitation refuses to recognize the existence of the mortgage or any equitable claim in the mortgageor, may stand upon such adverse claim and invoke the statute against the right of redemption. *Gordon v. Lewis, 378.*
5. **STATUTE OF LIMITATIONS : TACKING DISABILITIES.** There can be no tacking of disabilities to escape the bar of the statute of limitations. *Ib.*
6. **——— : ———.** Where a cause of action accrues to a woman under the disability of coverture, the statute of limitations will begin to run immediately upon her death against her children, notwithstanding their minority. *Ib.*

LUNATIC.

See INSANE PERSON.

LIS PENDENS.

LIS PENDENS. Where one marries the grantee in a conveyance after a suit has been commenced to set aside the deed because fraudulent, as to creditors, he takes subject to the result of the suit. *Lionberger v. Baker*, 447.

MARRIAGE.

1. **MARRIAGE.** Marriage is doubtless a valuable, as distinguished from a good consideration. *Lionberger v. Baker*, 447.
2. **VOLUNTARY CONVEYANCE : MARRIAGE : CONSIDERATION.** One marrying the grantee in a voluntary conveyance because of its provisions is regarded, it seems, as a purchaser for value. Such, however, is not the case with one who has only contracted or engaged to marry such grantee. *Ib.*
3. **LIS PENDENS.** Where one marries the grantee in such conveyance after a suit has been commenced to set aside the deed because fraudulent as to creditors, he takes subject to the result of the suit. *Ib.*

MARRIED WOMEN.

1. **MARRIED WOMAN : SEPARATE ESTATE.** Where land or other property is purchased by a husband with the proceeds of his wife's separate estate, it is in equity her separate estate, unless her intention to the contrary is shown, and this is the case although the title was taken in his name. *Martin v. Colburn*, 229.
2. **SEPARATE ESTATE, CONVEYANCE OF.** A wife cannot convey land although it is her separate estate, without her husband joining in the conveyance. (Black and Sherwood, JJ., dissenting) *Ib.*
3. **MARRIED WOMAN : CONTRACT.** A married woman who purchases personal property with her own means and on her own credit, can, since the act of 1875 (R. S., sec. 3296) charge it by her note, secured by her deed of trust thereon, for the payment of the purchase price. *Dailey v. The Singer Manufacturing Company*, 301.
4. **LIMITATIONS : TACKING DISABILITIES.** Where a cause of action accrues to a woman under the disability of coverture, the statute of limitations will begin to run immediately upon her death against her children, notwithstanding their minority. *Gordon v. Lewis*, 378.

5. **MARRIED WOMAN, SEPARATE PROPERTY OF: PRINCIPAL AND AGENT: ACTS OF HUSBAND.** A husband acting in the matter of arbitration proceedings connected with the separate estate of his wife will be regarded as her agent, and she will be considered a *femme sole* with respect to such property. *Keating v. Korfhage*, 524.
6. **MARRIED WOMAN: JUDGMENT.** A judgment which establishes no personal liability against a married woman, but is special and against her property burdened with an equitable charge and for the enforcement of the same, is not obnoxious to the objection that it is a judgment against a married woman. *Ib.*

MASTER AND SERVANT.

1. **MASTER AND SERVANT.** The trial court held to have rightly declared as a matter of law, that the relation of master and servant did not exist between the railroad and deceased in this case. *Carroll v. The Missouri Pacific Railway Co.*, 239.
2. **VICE-PRINCIPAL: FELLOW SERVANTS.** The rule announced in *Moore v. Ry.*, 85 Mo. 588, and *McDermott v. Ry.*, 87 Mo. 285, defining who is a vice-principal and what constitutes the relation of fellow servants, adhered to. *Dowling v. Gerard B. Allen & Co.*, 293.
3. **NEGLIGENCE: RAILROAD: VICE-PRINCIPAL.** Where a road master of a railroad, having general superintendence of its track, while engaged in superintending and directing the removal of a wrecked train, but not in the manual work of removing a wreck, gives a wrong signal to the engineer of a train assisting in removing the wreck, whereby a laborer engaged in the work of removal is injured, the railroad is liable therefor. (Following *Moore v. Railroad*, 85 Mo. 588). *Hoke v. The St. Louis, Keokuk & Northern Railway Company*, 360.
4. **FELLOW SERVANT: VICE-PRINCIPAL.** The road master was not a fellow servant of the one injured in the transaction in which the injury was received, but represented the company therein as vice-principal, or *alter ego*, and his negligence in the matter causing the injury was that of the company. *Ib.*

MEASURE OF DAMAGES.

See **DAMAGES**, 6, 7.

MEMORANDUM.

1. **CONTRACT FOR SALE OF LAND: SPECIFIC PERFORMANCE: MEMORANDUM.** A memorandum of a contract for the sale and conveyance of land, although signed only by the party to be charged, when sufficiently clear and certain in its terms, affords a competent basis for a suit for specific performance. *Mastin v. Grimes*, 418.

2. ——— : ——— : ———. Where the memorandum stated that the residue of the purchase money "is to be paid as soon as abstract to said lots can be examined," the abstract to be furnished by the vendor, the law would imply that after the examination of the abstract, a reasonable time was to be allowed the vendee in which to make the payment. *Ib.*

MINOR.

SALE OF LANDS OF MINOR : JURISDICTION. Under the revision of 1845 (R. S., 1845, chap. 73, sec. 22) the county court did not have jurisdiction to order the sale of the land of a minor for the purpose of his support and maintenance, but only for the purpose of procuring and completing the education of such minor. *Blackburn v. Bolan*, 80.

MISDEMEANORS.

APPEAL TO SUPREME COURT : MISDEMEANORS. The Supreme Court has no jurisdiction of appeals from the St. Louis court of appeals in misdemeanor cases. *The State v. McNeary*, 143.

MISTAKE OF LAW.

1. **EQUITY : MISTAKE OF LAW.** Equity will not afford relief against a mere mistake of law, unmixed with any mistake of fact. *The City of St Louis v. Priest*, 612.
2. **EQUITABLE RELIEF : MISTAKE OF LAW.** A mere mistake in a matter purely of law affords no ground for relief in a court of equity. *Norton v. Highleyman*, 621.

MORTGAGES AND DEEDS OF TRUST.

1. **DEED OF TRUST : SALE : TITLE.** A sale under a deed of trust where it has not been advertised for the time required by such deed, passes no title. *Siemers v. Schrader*, 20.
2. **MORTGAGEE : TRUSTEE : EJECTMENT.** A mortgagee, in the absence of an agreement to the contrary, may maintain ejectment for the mortgaged premises, after breach of the conditions, and so, it seems, may also a trustee in a deed of trust. *Ib.*
3. **EJECTMENT : CESTUI QUE TRUST.** The *cestui que trust* in a deed of trust to secure the payment of a debt, cannot maintain ejectment after condition broken. *Ib.*
4. **MORTGAGE : ADVERSE POSSESSION BY MORTGAGEE : LIMITATIONS.** A mortgagee in possession, who for the period of limitation refuses to recognize the existence of the mortgage or any equitable claim in the mortgageor, may stand upon such adverse claim and invoke the statute against the right of redemption. *Gordon v. Lewis*, 378.

5. DEED OF TRUST, CONSTRUCTION OF. By the provisions of the deed of trust in this case, given to secure the payment of certificates of indebtedness issued by a bank, the liability of the grantor was only secondary, and the land conveyed could not be resorted to for the payment of the certificates, until all the assets of the bank capable of collection by reasonable diligence were collected and applied on said certificates, and, therefore, held that the trustee could not maintain ejectment for the land to the end that he might apply the rents in discharge of the debts, so long as the requirements of the deed of trust, as to collecting and applying the assets, were not complied with. *Davis v. Bessehl*, 439.
6. TRUSTEE: EJECTMENT. Whether a trustee in a deed of trust in the nature of a mortgage, like a mortgagee, can maintain ejectment not decided. *Ib.*
7. TRUST DEED: DELEGATION OF POWER OF TRUSTEE. A trustee in a deed of trust cannot delegate the trust or power of sale to a third person, unless expressly authorized to do so by the deed, and a sale made by such delegated agent, when unauthorized by the deed, is void. *The City of St. Louis v. Priest*, 612.
8. SUBROGATION: MORTGAGE: VOLUNTEER. Before a third party, making payment of a debt secured by mortgage, can be subrogated to the rights of the mortgagee, he must show either that he made the payment at the request of the mortgageor, or to protect some interest of his own, had at the time of the payment. *Norton v. Highleyman*, 621.

MOTIVE.

FRAUD: EVIDENCE: MOTIVE. Evidence tending to show an absence of motive for fraud, or that no injury resulted from the fraud, even if any were committed, is competent to rebut a charge of fraud. *Lenox v. Harrison*, 491.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATION: FALSE IMPRISONMENT BY OFFICERS OF, ACTION FOR: PLEADING. A petition in an action against a municipal corporation for false imprisonment by its officers, is fatally defective which fails to state that defendant was arrested for the violation of one of its ordinances, or which omits to set out the cause of said arrest. *Worley v. The Inhabitants of the Town of Columbia*, 106.
2. ———: POLICE OFFICERS. Police officers of a town, engaged in enforcing its police regulations, are not regarded as officers of the town, in its corporate capacity, and the town is not liable for acts done by them while so engaged. *Ib.*
3. ———: TRESPASS BY OFFICERS: VOID ORDINANCE. A municipal corporation is not liable for a trespass committed by its officers in the enforcement of a void ordinance. *Ib.*

4. CITY : DEDICATION OF STREET, ACCEPTANCE OF. There can be no dedication of land to a city for a street without an acceptance of the same by it. *The City of St. Louis v. The St. Louis University*, 155.
5. ——— : ———. A city cannot accept the dedication of land outside of its territorial limits for street purposes. *Ib.*
6. ———. STREET, USE OF. When the public acquires a street in a city, either by condemnation, grant or dedication, it may be applied to all purposes consistent with the proper use of a street. *The Julia Building Association v. The Bell Telephone Company*, 258.
7. ——— : ——— : ———. It is only when the street is subjected to a new servitude inconsistent with and subversive of its proper use as a street, that the abutting land owner can complain. *Ib.*
8. TELEPHONE POLES : STREET. The erection and maintenance of telephone poles are a proper use of a street. *Ib.*
9. ——— : INJURY TO ADJOINING PROPERTY : DAMAGES. *Seem*, that the owner of the adjoining premises cannot claim compensation for damages resulting thereto from such user of the street. *Ib.*
10. ——— : ——— : ———. In no event would compensation in such case be allowed for speculative or contingent damages. *Ib.*
11. ——— : ——— : ———. Compensation could, however, be recoverable by the adjoining owner for damages resulting to his property from the unskillful and negligent conduct of the work. *Ib.*
12. CORPORATE EXISTENCE : PLEADING. The averment in an action against a city that it is a corporation created and organized under the provisions of article 3, of chapter 89, Revised Statutes, sufficiently alleges the incorporation of the city as one of the fourth class. *Eubank v. The City of Edina*, 650.
13. ——— : ADMISSION OF. Where a public corporation appears to an action and makes an affirmative defence, like a private corporation, it admits its corporate existence. *Ib.*
14. ——— : EVIDENCE. Where, without question or objection, the mayor and other officers testified as to their official capacity and a pamphlet purporting to be the ordinance of the city was put in evidence showing that defendant has a mayor, alderman and such other officers as cities of the fourth class have, the proof was ample that the defendant was a municipal corporation and a city of the fourth class. *Ib.*
15. DEFECTIVE SIDEWALK : EVIDENCE. In an action against a city for injury from a defective sidewalk it is competent to introduce evidence showing the condition of the walk, but it is for the jurors and not for the witnesses to determine from these facts whether

under all the circumstances the walk was in a reasonably safe condition. The witnesses should not be allowed to state if they knew whether the sidewalk was in a reasonably safe condition for the traveling public. *Ib*

MURDER.

1. CRIMINAL PRACTICE: MURDER: STATUTE: INSTRUCTIONS. Revised Statutes, section 1654, provide "that any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide." *Held*, that while on a trial of an indictment for murder in the first degree, it is error to give an instruction on murder in the second degree, where there is no evidence to support it, still giving it is, under said statute, not reversible error. *The State v. Nelson*, 126.
2. ———: VARIANCE. The wound, on a trial for murder, may be proved by the state to have been made on a part of the body different from that alleged in the indictment. *The State v. Waller*, 402.

NEGLIGENCE.

1. COMMON CARRIER. The undertaking of a common carrier of passengers is to carry the latter without fault or negligence, but the carrier is not an insurer against accidents. *Leslie v. The Wabash, St. Louis & Pacific Ry. Co.*, 50.
2. NEGLIGENCE: ALIGHTING FROM CAR. For one who voluntarily and not to avoid some threatened danger, to jump from a train of steam cars while in rapid motion, is negligence, but to step from a car while in motion, to a station platform, may or may not be negligence. *Ib*.
3. QUESTION OF FACT. Whether the latter is or is not negligence is a question of fact for the jurors to determine from the attending circumstances, and in such case the better practice is to submit the question, by leaving it to the jurors to determine whether a prudent person, in a like situation and under similar circumstances, would have made the step or leap. *Ib*.
4. CONTRIBUTORY NEGLIGENCE: PERSONS WORKING IN COAL MINES: STATUTE. The act of the general assembly of March 23, 1881 (*Laws* 1881, p. 165), providing for the health and safety of persons employed in coal mines, does not exempt any one so employed from the direct and immediate consequence of his own carelessness. *Spira v. The Osage Coal & Mining Co.*, 68.
5. ———: ———: RIGHT OF ACTION. Where one so employed in a coal mine is injured and killed, his widow will have no right of action therefor, if the husband could not have maintained an action had death not ensued. *Ib*.

6. PERSONS EMPLOYED IN COAL MINES : ACT OF MARCH 23, 1881, ACTION ON. In an action on said statute of March 23, 1881, for an injury to an employe in a coal mine, by reason of the neglect of the defendant to fence the entrance of the shaft, the only inquiry is whether the requirements of the statute were complied with, and if not, whether the injury complained of was occasioned thereby. *Ib.*
7. PRACTICE : INSTRUCTIONS : NEGLIGENCE. In an action for injuries resulting from the alleged negligence of defendant, and in which the issue of plaintiff's contributory negligence is made, an instruction is erroneous which hypothecates the facts as to defendant's negligence, and authorizes a verdict for plaintiff therein without in the same instruction limiting such right of recovery to the absence of such contributory negligence on the part of plaintiff. *Sullivan v. The Hannibal & St. Joseph Ry. Co.*, 169.
8. ——— : ——— : ———. Such defect in the instruction is not cured by other instructions given in the case which so limit plaintiff's right to recovery if he was guilty of contributory negligence. (Black and Norton, JJ., dissenting). *Ib.*
9. NEGLIGENCE : RAILROAD : PASSENGER. A drover transported over a railroad on a pass for the purpose of taking care of his stock on the train is a passenger, and the railroad cannot stipulate for exemption from liability for injuries to him caused by its negligence. *Carroll v. Mo. Pac. Ry. Co.*, 239.
10. ——— : INEXPERIENCED YOUTH. While less care and foresight are exacted of an inexperienced youth than of a man of mature years, yet if the former was aware of the danger to which he was exposed, any negligence on his part which contributed directly to his injury will defeat his recovery. *Dowling v. Gerard B. Allen & Co.*, 293.
11. RAILROAD : ROAD CROSSING : RINGING BELL, ETC. A railroad is guilty of negligence in not ringing the bell, or sounding the whistle of its locomotive at a distance of eighty rods from a road crossing. *Petty v. The Hannibal & St. Joseph Ry. Co.*, 306.
12. ——— : ——— : ——— : CONTRIBUTORY NEGLIGENCE. Although one is injured by reason of the failure of the servants of the railroad to comply with the statutory requirement as to ringing the bell and sounding the whistle of its locomotive, he cannot recover if his own negligence directly contributed to the injury. *Ib.*
13. CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION FOR THE JURY. When the undisputed facts relied on to establish contributory negligence are such as may, in the judgment of sensible men, lead to different conclusions thereon, the question should be submitted to the jury. *Ib.*
14. RAILROAD CROSSING : TRAVELER. Negligence is not imputable to one for attempting to drive over a railroad crossing without stop-

ping and looking for a train, when by doing so he could not have seen the train which occasioned the injury. *Ib.*

15. CONTRIBUTORY NEGLIGENCE. Contributory negligence is a matter of defence, and need not be alleged or proved by the plaintiff. *Ib.*
16. RAILROADS : COMMON CARRIERS : PERSONAL INJURIES : NEGLIGENCE : BURDEN OF PROOF. Where in an action by a passenger against a railroad company for damages for injuries caused by the derailment of the latter's train, the evidence shows that the plaintiff was injured without any fault on his part, a *prima facie* case is made out for him, and the *onus* is cast upon the defendant of relieving itself from responsibility by showing that the injury was the result of an accident which the utmost skill, foresight and diligence could not have prevented. *Hipsley v. The Kansas City, St. Joseph & Council Bluffs Ry. Co.*, 348.
17. NEGLIGENCE : RAILROAD : VICE-PRINCIPAL. Where a road master of a railroad, having general superintendence of its track, while engaged in superintending and directing the removal of a wrecked train, but not in the manual work of removing a wreck, gives a wrong signal to the engineer of a train assisting in removing the wreck, whereby a laborer engaged in the work of removal is injured, the railroad is liable therefor. (Following *Moore v. Railroad*, 85 Mo. 588). *Hoke v. The St. Louis, Keokuk & Northern Railway Co.*, 360.
18. NEGLIGENCE : RAILROAD : PERSON ON PRIVATE RIGHT OF WAY : KNOWLEDGE OF BY SERVANTS OF COMPANY : DUTY TO AVOID ACCIDENT. Notwithstanding one who was killed by being run over by a tender of an engine was guilty of negligence, in being at the time on the private right of way of the railroad, still if those in charge of the tender and engine saw him in an exposed and dangerous position in time to have avoided the injury, then they were bound to use all reasonable efforts consistent with their own safety and that of the engine and tender to avoid such injury. *Rine v. The C. & A. Ry. Co.*, 392.
19. — : — : — : —. The liability of the company in such case is limited to negligence and want of care occurring after the exposed and dangerous position of the injured party came to the knowledge of the servants charged with the want of care. *Ib.*
20. — : — : — : —. The company is not liable in such case on the theory that the servants of the company might, by the exercise of ordinary care, have become aware of the negligence of the deceased and his dangerous condition in time to have avoided the accident, and failed to do so. *Ib.*
21. — : — : — : —. This case distinguished in the latter respect from the cases of *Frick v. Ry.*, 75 Mo. 595, and *Kelly v. Ry.*, 75 Mo. 138. *Ib.*

22. ——— : RAILROAD TRACK : CITY ORDINANCE. Notwithstanding a person is guilty of negligence in going on a railroad track without looking or listening for a train, when he could have seen or heard it if he had so looked or listened, still the company will be liable for his death caused by backing its train on him, if it could have avoided the accident by having observed the provisions of an ordinance of the city in which the accident occurred, requiring it to have a man stationed on the end of its train to give danger signals when backing through the city. *Bergman v. The St. L., I. M. & S. Ry. Co.*, 678.
23. ——— : ——— : RECOVERY NOTWITHSTANDING FAILURE TO LOOK AND LISTEN. While it was negligence on the part of the deceased to go on the track without looking or listening for a train, the railroad is still liable, notwithstanding that fact, if it either knew, or might have known, by the exercise of ordinary diligence, of the danger of the deceased in time to have prevented the accident. *Ib.*

NEW TRIAL.

MOTION FOR NEW TRIAL : PRACTICE. A party is entitled to four working days within which to move for a new trial or in arrest of judgment. Sundays should not be counted. *Cattle - Dispatch Publishing Co.*, 356.

NOTICE.

1. COUNTY COURTS, POWERS OF : NOTICE. The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law, and when they exceed their statutory authority their acts are void. Persons dealing with such agents are bound to take notice of their powers and authority. *Sturgeon v. Hampton*, 203.
2. ——— : NOTICE. The court refuses to disturb the judgment in this case because of alleged want of reasonable notice to the opposite party of the application for the change of venue. *Dowling v. Gerard B. Allen & Co.*, 293.
3. ——— : NOTICE TO COMPLETE CONTRACT. Where either the vendor or the vendee has improperly and unreasonably delayed in complying with the terms of an agreement for the sale and conveyance of land, the other party may by notice fix the time within which the contract may be completed, but such notice must allow a reasonable length of time for the other party to perform his part of the contract, and if it fail in this respect it may be disregarded. *Mastin v. Grimes*, 478.
4. ——— : ———. A notice given by the vendor to the vendee to

complete the contract within five days held insufficient under the circumstances in this case. *Ib.*

See COMPOSITION.

INSANE PERSON.

PARTY WALL, 2, 3.

OFFICES AND OFFICERS.

1. ———: POLICE OFFICERS. Police officers of a town, engaged in enforcing its police regulations, are not regarded as officers of the town, in its corporate capacity, and the town is not liable for acts done by them while so engaged. *Worley v. The Inhabitants of the Town of Columbia*, 106.
2. ———: TRESPASS BY OFFICERS: VOID ORDINANCE. A municipal corporation is not liable for a trespass, committed by its officers in the enforcement of a void ordinance. *Ib.*
3. OFFICERS, PRESUMPTIONS AS TO ACTS OF. Presumptions are in favor of the regularity of the acts of public officers, and this rule applied in this case to officers taking acknowledgment of deeds. *Addis v. Graham*, 197.
4. JUSTICES OF PEACE, ELECTION OF: REVISED STATUTES, SECTION 2807. The effect of the enactment of Revised Statutes, 1879, section 2807, in reference to the election and terms of office of justices of the peace was to supersede and repeal all prior statutes authorizing the election of such officers prior to the general election in November, 1882, and any election so held in contravention of said section of the statute was void. Re-affirming *The State ex rel. the Circuit Attorney v. McCann*, 81 Mo. 479. *The State ex rel. Harris v. McCann*, 386.
5. ———. The appointment and commission of respondent as a justice of the peace by the mayor of the city of St. Louis, held to be of no validity, because there was no vacancy to be filled. *Ib.*
6. QUO WARRANTO: OFFICE: BURDEN OF PROOF. In a *quo warranto* proceeding against one for usurping an office, the burden is on the latter to show title thereto. *Ib.*
7. ———: RETURN, SUFFICIENCY OF. The return in such proceeding for usurping the office of justice of the peace, is insufficient if it fails to show that the respondent qualified under the appointment by virtue of which he claims the office. *Ib.*
8. OFFICER: ATTACHMENT: PRESUMPTION. Where under a writ of attachment, directing a sheriff to levy on the property of the defendant therein, the officer seizes property in possession of a stranger to

the writ, such seizure is *prima facie*, wrongful as against such party in possession and in an action therefor by the latter against the officer on his bond, no presumption obtains in favor of the officer that he did his duty in making the levy. *The State ex rel. Robertson v. Hope*, 430.

9. ——— : ——— : ———. It is only where the controversy is between the officer and party to the writ that such presumption exists. *Ib.*

ORDINANCE.

See ST. LOUIS.

PARTIES.

EJECTMENT : PARTIES. In ejectment, a landlord has a right on his motion to be made a co-defendant with his tenant. *Hill v. Atterbury*, 114.

PARTITION.

1. **PARTITION : FINAL JUDGMENT : APPEAL.** In a partition suit the order of sale is not a final judgment from which an appeal will lie. *Turpin v. Turpin*, 337.
2. ——— : **SALE : WILL.** Where a sale is required to effect a partition of lands under a will, the proceeds will stand in lieu of the land and the amount of the sale, and not the value of the land fixed by the commissioners, will determine the sum to go into the computation for division. *Ib.*
3. ——— : **COSTS.** The proceeds of the sale of one tract of land, sold for the purpose of partition, cannot be applied in payment of fees or costs in proceedings for partition of another tract of land, *Dale v. Dale*, 462.

PARTNERSHIP.

1. **PARTNERSHIP.** A mere participation in the profits and loss does not necessarily constitute a partnership between the parties so participating, *Kellogg Newspaper Company v. Farrell*, 594.
2. ———. Whether the relation of partnership exists depends largely on the intention of the parties. *Ib.*
3. ———. A contract construed and held not to constitute the parties thereto partners. *Ib.*

4. LIMITED PARTNERSHIP. LOAN TO BY SPECIAL PARTNER. An advancement made by a special partner to a limited partnership by way of a loan is within the terms of Revised Statutes, section 3406, which postpones such partner as a creditor where the firm is insolvent, until the other creditors are paid. *Jaffe v. Krum*, 669.
5. ———. The common law governs limited partnerships where no contrary provision is made by the statute. *Ib.*

PARTY WALL.

1. PARTY WALL : CONTRACT : EQUITABLE EASEMENT. Where owners of adjoining premises made an agreement under seal for themselves, but not acknowledged and recorded, whereby one was to build a party wall, and the other, when he should use it in the constructing of his building, was to pay half the cost of such wall, the effect of such agreement was to create cross-easements as to each owner, and a purchaser of the estate with notice, would take it burdened with the liability to pay one-half the cost of the wall whenever he should avail himself of its benefits. *Sharp v. Cheatham*, 498.
2. ——— : ——— : ——— : NOTICE. One purchasing under a quitclaim deed, would not, without actual notice, be bound by such agreement. *Ib.*
3. CONTRACT : PARTY WALL : EQUITABLE EASEMENT : NOTICE. The agreement in this case, by which the owners of adjoining lots bound themselves, their heirs and vendees in relation to a party wall between their respective lots, held (following *Sharp v. Cheatham*, ante, p. 498) to create an equitable charge, easement and servitude upon the lot of the defendant, and the agreement being duly executed, acknowledged and recorded affects with notice any one afterward purchasing and subjects him to the equities created by the agreement. *Keating v. Korfhage*, 524.
4. ——— : ——— : ESTOPPEL. Where a party to a contract to build a party wall, during the time he continued to be the owner of his lot, acquiesced in the construction of the wall, such acquiescence will estop him and any one claiming under him from afterward objecting to the methods whereby and materials with which such wall was constructed. *Ib.*
5. ——— : ———. Acquiescence by the owner in a change of materials used in the construction of the wall had the effect to alter the agreement in that particular and rendered it binding upon one who received a conveyance of the lot from him without any consideration. *Ib.*
6. ARBITRATION : EQUITY : PARTY WALL. The refusal of a husband who is acting for his wife to proceed with an arbitration provided for in a contract for building a party wall and ascertaining the cost of the same, after the proceeding had been instituted and the arbitrators had failed to agree, is sufficient to authorize equitable interposition to ascertain the cost of the wall. *Ib.*

PERSONAL PROPERTY.

PERSONAL PROPERTY, POSSESSION OF. Possession of personal property is presumptive evidence of title. *The State ex rel. Robertson v. Hope*, 430.

PLEADING.

1. **SPECIAL TAX BILL : PLEADING : EVIDENCE.** The petition in this case, which was a suit to enforce the collection of special tax bills, held good and objections to offers of evidence made at the trial properly overruled. *Buchan v. Broadwell*, 31.
2. **PLEADING.** Traverses and answers in avoidance may be joined when not inconsistent. *Ledbetter v. Ledbetter*, 60.
3. **EJECTMENT : ANSWER : JOINDER OF DEFENCES.** A defendant in ejectment may plead a general denial and rely upon that as a complete defence, and may also, in the same answer, plead and rely upon an equitable defence, but the pleadings should be so framed as to show that both defences are relied on. *Ib.*
4. ——— : ———. If in pleading his equity the defendant unqualifiedly pleads the legal title or right of possession out of himself and in the plaintiff, the latter will not be required to offer any evidence of his title, especially if he waives damages, rents and profits. *Ib.*
5. **MUNICIPAL CORPORATION : FALSE IMPRISONMENT BY OFFICERS OF : ACTION FOR : PLEADING.** A petition in an action against a municipal corporation for false imprisonment by its officers, is fatally defective which fails to state that defendant was arrested for the violation of one of its ordinances, or which omits to set out the cause of said arrest. *Worley v. The Inhabitants of the Town of Columbia*, 106.
6. **QUANTUM MERUIT : PLEADING.** It is no objection in an action for work done and materials furnished, that the petition sets out the contract and a compliance with its terms, and the termination of the contract by defendant, provided it shows that plaintiff elects to treat it as cancelled and seeks to recover for the services rendered. *Ehrlich v. The Aetna Life Insurance Company*, 249.
7. ——— : ———. Where the petition counts on both the theory of a breach of the contract and a *quantum meruit*, the remedy of the defendant is by motion. *Ib.*
8. **PLEADING : PRACTICE : ADMINISTRATION.** The following claim: "To services rendered from July, 1869, to February, 1872, \$2,500," presented against an estate and allowed in the probate court, should, upon motion of the executor in the circuit court upon his appeal, be made more specific and definite. *Watkins v. Donnelly*, 322.

9. PRACTICE: PLEADING. A party must abide by the case made by his pleadings; he can urge nothing inconsistent therewith or repugnant thereto. *Lenox v. Harrison*, 491.
10. EJECTMENT BY TENANT IN COMMON: PLEADING. In an action of ejectment by one tenant in common against his co-tenant, under a petition in the ordinary form as prescribed by the statute, a recovery may be had where the proof shows an ouster, or act amounting to a total denial of plaintiff's right. *Falconer v. Roberts*, 574.
11. CORPORATE EXISTENCE: PLEADING. The averment in an action against a city that it is a corporation created and organized under the provisions of article 3, of chapter 89, Revised Statutes, sufficiently alleges the incorporation of the city as one of the fourth class. *Eubank v. City of Edina*, 650.

PLEADING, CRIMINAL.

1. PLEADING, CRIMINAL: INDICTMENT: FALSE PRETENSES. An indictment under Revised Statutes, section 1561, for obtaining money by means of a false and fraudulent representation, which follows the form prescribed by that section, is sufficient. *The State v. Bayne*, 604.
2. CRIMINAL PLEADING: STATUTE. Where an indictment is founded on a statute creating an offence unknown to the common law, it must set forth all the constituent facts and circumstances necessary to bring the accused fully within the statutory provisions. *The State v. Gabriel*, 631.
3. CRIMINAL LAW: INFORMATION: AMENDMENT. An information for a criminal offence in a case originating in an inferior court cannot be amended in an appellate court. *The State v. Russell*, 648.
4. ———: ———. The legislature cannot authorize the institution of a criminal prosecution in any other mode than that prescribed by section twelve of article two of the constitution of 1875, and the word "information," as used in that section, means the common law pleading known by that name. *The State v. Kelm*, 79 Mo. 515. *Ib.*

POLICE COMMISSIONERS.

See ST. LOUIS.

POSSESSION.

- PERSONAL PROPERTY, POSSESSION OF. Possession of personal property is presumptive evidence of title. *The State ex rel. Robertson v. Hope*, 430.

PRACTICE, CIVIL.

1. PRACTICE : CHANGE OF VENUE. On an application for a change of venue, it appeared that the same was sworn to by a nominal party to the suit ; that the prejudice of the inhabitants was alleged to be against him alone, and also that a number of counter affidavits were filed, but they were not preserved in the record ; held, that under the facts the Supreme Court could not say that error was committed in overruling the application. *Buchan v. Broadwell*, 31.
2. — : VARIANCE : FAILURE OF PROOF. The rule that a plaintiff cannot declare upon one cause of action and recover upon a different one prevails under the code, but Revised Statutes, sections 3565 and 3702, recognize a plain distinction between a variance and a total failure of proof. *Leslie v. The W., St. L. & P. Ry. Co.*, 50.
3. NEGLIGENCE : ALIGHTING FROM CAR : PRACTICE. For one, voluntarily, and not to avoid some threatened danger, to jump from a train of steam cars while in rapid motion, is negligence, but to step from a car, while in motion, to a station platform, may or may not be negligence. Whether the latter is or is not negligence is a question of fact for the jurors to determine from the attending circumstances, and in such case the better practice is to submit the question, by leaving it to the jurors to determine whether a prudent person, in a like situation and under similar circumstances, would have made the step or leap. *Id.*
4. PRACTICE. A motion in the nature of a demurrer to a plea in abatement should be directed against the objectionable part of the plea. *Mo. Glass Co. v. Copeland S. M. Co.*, 57.
5. —. Where there is no dispute as to the facts, it is the duty of the court to apply the law thereto. *Spiva v. The Osage Coal and Mining Co.*, 68.
6. EJECTMENT : PARTIES. In ejectment, a landlord has a right, on his motion, to be made a co-defendant with his tenant. *Hill v. Atterbury*, 114.
7. PRACTICE. The fact that the trial court overruled plaintiff's motion to strike out matters of defence properly provable under the general issue, affords no ground for reversing the judgment. *Id.*
8. CIVIL PRACTICE : ORDER OF PUBLICATION. The order of publication made against non-resident, absent or unknown defendants, must designate therein the paper most likely to give notice to the person to be notified. (R. S., sec. 3500). *Otis v. Epperson*, 131.
9. — : —. When the order of publication is made in term by the court, the order so made must be published in the paper selected by the court. *Id.*
10. — : — : JURISDICTION. Where in such case the order

made by the court is not published, and instead thereof one made by the clerk is substituted and published, the court will obtain no jurisdiction over the defendants intended to be notified. *Ib.*

11. ——— : PRESUMPTIONS : CERTIORARI. In proceedings by *certiorari*, it will not be presumed from a record which shows merely the removal of an officer that such removal was for cause shown. *The State ex rel. Campbell v. The Board of Police Commissioners of St. Louis*, 144.
12. PRACTICE. In such a proceeding such a record will be quashed. *Ib.*
13. INSTRUCTIONS. The proper province of an instruction is to submit questions of fact, not propositions of law. *Albert v. Bessel*, 150.
14. PRACTICE : INSTRUCTIONS : NEGLIGENCE. In an action for injuries resulting from the alleged negligence of defendant, and in which the issue of plaintiff's contributory negligence is made, an instruction is erroneous which hypothecates the facts as to defendant's negligence, and authorizes a verdict for plaintiff therein without in the same instruction limiting such right of recovery to the absence of such contributory negligence on the part of plaintiff. *Sullivan v. The H. & St. J. Ry. Co.*, 169.
15. ——— : ——— : ———. Such defect in the instruction is not cured by other instructions given in the case which so limit plaintiff's right of recovery if he was guilty of contributory negligence. (Black and Norton, J.J., dissenting). *Ib.*
16. ACTION BY WIFE FOR DEATH OF HUSBAND : COLLECTION OF INSURANCE MONEY BY HER. The fact that plaintiff's husband had his life insured, payable to her, and that after his death she collected the insurance money, is no defence to an action on said statute. *Carroll v. Mo. Pac. Ry. Co.*, 239.
17. INSTRUCTION. The assumption in an instruction of the existence of a fact as to which there is no controversy, is no ground for a reversal. *Ib.*
18. SERVANT, DISCHARGE OF : ELECTION. Where a servant is wrongfully discharged by his master, he may sue for a breach of the contract or he may elect to treat the contract as rescinded, and recover on a *quantum meruit* for the services rendered. *Ehrlich v. Aetna Life Ins. Co.*, 249.
19. CONTRACTOR, WHEN PREVENTED FROM COMPLETING WORK : REMEDIES. A contractor who has been prevented by the other party from completing his work, may waive the action for damages and sue for the value of the work done and materials furnished, and he is not in such case restricted to a *pro rata* share of the contract price. *Ib.*

20. **WAIVER.** Waiver is ordinarily a question of intention and a fact to be determined by the triers of fact. *Ib.*
21. **QUANTUM MERUIT: PLEADING: PRACTICE.** Where the petition counts on both the theory of a breach of the contract and a *quantum meruit*, the remedy of the defendant is by motion. *Ib.*
22. **INSTRUCTION: ASSUMPTION OF FACT.** The judgment in this case reversed, because of the assumption of a material fact in an instruction given for the plaintiff. *Dowling v. Gerard B. Allen & Co.*, 293.
23. **CHANGE OF VENUE, WHEN MUST BE GRANTED.** An application for a change of venue because of the prejudice of the inhabitants of the county, if sufficient in form and substance, must be granted. The facts alleged in it cannot be controverted by the opposing party. *Ib.*
24. ———: **NOTICE.** The court refuses to disturb the judgment in this case because of alleged want of reasonable notice to the opposite party of the application for the change of venue. *Ib.*
25. **PRACTICE IN PROBATE COURT: ADMINISTRATION.** While formal pleadings are not required in probate courts, accounts and statements presented there for allowance should be sufficiently specific to apprise those in charge of estates of the facts involved, so that they may be able to protect the interests intrusted to their care and prevent the allowance of unjust demands. *Watkins v. Donnelly*, 322.
26. **PLEADING: PRACTICE: ADMINISTRATION.** The following claim: "To services rendered from July, 1869, to February, 1872, \$2,500," presented against an estate and allowed in the probate court, should, upon motion of the executor in the circuit court upon his appeal, be made more specific and definite. *Ib.*
27. **ADMINISTRATION: EVIDENCE.** Failure to make, keep and present an account to a person for \$2,500 for services claimed to have been rendered him during two and a half years affords some evidence adverse to such claim when presented for allowance against his estate. *Ib.*
28. **RAILROADS: COMMON CARRIERS: PERSONAL INJURIES: NEGLIGENCE: BURDEN OF PROOF.** Where in an action by a passenger against a railroad company for damages for injuries caused by the derailment of the latter's train, the evidence shows that the plaintiff was injured without any fault on his part, a *prima facie* case is made out for him, and the *onus* is cast upon the defendant of relieving itself from responsibility by showing that the injury was the result of an accident which the utmost skill, foresight and diligence could not have prevented. *Hipsley v. The Kansas City, St. Joseph & Council Bluffs Ry. Co.*, 348.

29. ——— : ——— : ——— : PRACTICE. In such action, where the evidence on the part of the plaintiff makes out a *prima facie* case for him, which is rebutted by the evidence on the part of the defendant, it is error to take the case from the jury by instruction, and they should be allowed to pass upon the credibility of the witnesses and the weight of their testimony. *Ib.*
30. PRACTICE : FINDING OF JURY, WHEN SET ASIDE. When the right of the jury to pass upon the credibility of witnesses and weight of evidence is abused by them, the trial court may set aside their verdict on proper motion, and take the verdict of another jury, or the Supreme Court will grant a new trial where it appears that the verdict is so clearly against the weight of evidence that it must have been the result of passion or prejudice. *Ib.*
31. CIVIL PRACTICE : VERDICT. A jury in an action for libel returned into court a verdict, "We find no cause of action," and on their attention being called by the court to its insufficiency, and that it should be in form a finding for the defendant, they declined to make the change. *Held*, that it was the duty of the court to direct the jury to retire and further consider their verdict, and to return one in proper form for plaintiff or defendant. *Cattell v. The Dispatch Pub. Co.*, 356.
32. ——— : ———. Where a verdict is imperfect and informal the court may direct the jury to amend it, and may direct them to return to the jury room for that purpose. *Ib.*
33. ——— : ———. It is the duty of the court to see that improper and informal verdicts are not entered on its records. *Ib.*
34. MOTION FOR NEW TRIAL : PRACTICE. A party is entitled to four working days within which to move for a new trial or in arrest of judgment. Sundays should not be counted. *Ib.*
35. CONVEYANCE IN FRAUD OF CREDITORS : SPECIAL DEFENCE, WAIVER OF. The objection in an action to set aside a deed because made in fraud of creditors, that the defence that the land conveyed was a homestead of the debtor was not specially pleaded, is waived unless made when the evidence was offered. *Zickel v. Douglass*, 382.
36. BILL OF EXCEPTIONS : FILING IN VACATION. An entry of record to the effect that, on motion of defendant, and by consent of plaintiff, leave was given to file the bill of exceptions thirty days after term is sufficient to authorize the filing of the bill. The fact that the court made the order sufficiently shows its consent thereto. *Rine v. The C. & A. R. R. Co.*, 392.
37. CONVEYANCE IN FRAUD OF CREDITORS : REMEDIES OF CREDITOR. A judgment creditor has the option of either first bringing suit to set aside the fraudulent deed of his debtor and then selling under execution the latter's interest ascertained by the suit, or the creditor may first sell under execution and the purchaser may set aside the fraudulent deed. *Lionberger v. Baker*, 447.

38. SPECIFIC PERFORMANCE : ACTION BY VENDEE : DEFENCE. In an action by a vendee for the specific performance of a contract for the sale and conveyance of land, the vendor set up as a defence that the plaintiff, for the purpose of preventing a compliance with the terms of the contract on his part, had falsely and fraudulently pretended that the defendant's title to the land was imperfect; *held*, that the failure of the vendor to rescind the contract and to return or to offer to return the portion of the purchase money which he received was a bar to said defence. *Mastin v. Grimes*, 478.
39. ADMINISTRATION : FINAL SETTLEMENT : EQUITY : PRACTICE. It is only upon the ground that there has been a final settlement, binding and conclusive at law, that a proceeding in a court of chancery can be maintained to set the same aside upon the ground of fraud. And where the petition alleges that the administrator fraudulently failed and refused to publish notice of final settlement, the plaintiffs have no standing in equity, their remedy at law being ample and adequate. *Lenox v. Harrison*, 491.
40. PRACTICE : PLEADING. A party must abide by the case made by his pleadings; he can urge nothing inconsistent therewith or repugnant thereto. *Ib.*
41. ——— : PRACTICE. In order to warrant a recovery upon the ground of fraud, there must be a concurrence of both fraud and injury. *Ib.*
42. ——— : ——— : EQUITY : LACHES. Equity views with disfavor suits brought after the death of one whose estate is sought to be charged, where the fraud alleged was known before such death, and the suit might have been brought during the lifetime of the party; and where, without reason, the suit is delayed until after his death, such laches must be held fatal. *Ib.*
43. PRACTICE : PRESUMPTIONS. The cause having been tried by the court without a jury, and no declarations of law having been asked or given, it will be presumed, on appeal, that the court entertained correct views of law, and if there is substantial evidence to support the judgment, it will be affirmed. *Johnson v. Lullman*, 567.
44. DEMURRER TO EVIDENCE : PRACTICE. A demurrer to the evidence admits every fact which any of the evidence tends to prove and also every fact that the jurors may with propriety infer from the evidence before them. It should be allowed only when the evidence thus considered wholly fails to make proof of some essential averment. *Noeninger v. Vogt*, 589.
45. ——— : ———. Where the evidence tends to support one of the two counts of the petition, the demurrer to the evidence should be overruled. *Ib.*

See RAILROADS, 14.

PRACTICE, CRIMINAL.

1. CRIMINAL PRACTICE : INSTRUCTIONS. It is the duty of the court to instruct the jury with reference to the evidence in the case and where the evidence in a criminal trial all tends to prove one offence, instructions should not be given as to a different one. *The State v. Wilson*, 13.
2. ——— : ———. The application of the above rule by the trial court in refusing an instruction for murder in the second degree on the trial of one on an indictment for murder in the first degree approved. *Ib.*
3. CRIMINAL LAW : CONSTITUTION : FORMER JEOPARDY. Where a defendant, who has been convicted of a criminal offence, asks and obtains a new trial, he may again be put on trial upon the facts before charged against him, and the proceedings had on the first trial will constitute no protection on the second one. *The State v. Patterson*, 88.
4. CRIMINAL PRACTICE : DEFENDANT TESTIFYING, CROSS-EXAMINATION OF. A defendant testifying as a witness on a criminal trial should not be cross-examined by the state as to matters not testified to by him in chief. *Ib.*
5. ——— : SEDUCTION OF FEMALE UNDER PROMISE OF MARRIAGE : PRIOR ACTS OF UNCHASTITY OF PROSECUTRIX. On the trial of an indictment, under Revised Statutes, section 1259, for seducing a female under promise of marriage, it is competent for the defendant to show that prior to the time of the alleged seduction, the prosecutrix was guilty of acts of lewdness and unchastity with other men than the defendant. (Overruling *The State v. Brassfield*, 81 Mo. 151). *Ib.*
6. ——— : ARRAIGNMENT OF DEFENDANT. The Supreme Court will reverse a judgment in a criminal case where the record fails to show an arraignment of the defendant. *The State v. Vanhook*, 105.
7. ——— : JURORS : STATUTE. The statutory method of summoning, drawing and impaneling jurors is directory and not mandatory, and if the jurors are qualified to serve as such, and it does not appear that defendant was prejudiced the judgment will not be reversed at his instance because of irregularity or informality in their selection. *The State v. Matthews*, 121.
8. ——— : EVIDENCE. Where it is sought to contradict a witness by the contents of a writing signed by him he should not be asked as to statements which counsel may suggest are contained in such writing, but the instrument itself should be read in evidence. *Ib.*
9. ——— : ———. A judgment against a defendant will not, however, be reversed for a violation of the foregoing rule, where it does not appear that the defendant was prejudiced thereby. *Ib.*

10. ——— : MURDER : STATUTE : INSTRUCTIONS. Revised Statutes, section 1654, provide "that any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide." *Held*, that while on a trial of an indictment for murder in the first degree, it is error to give an instruction on murder in the second degree, where there is no evidence to support it, still, giving it is, under said statute, not reversible error. *The State v. Nelson*, 126.
11. CRIMINAL LAW : EVIDENCE. The judgment reversed because of the improper admission in evidence of the threats and demonstrations of a mob against defendant, occurring shortly after the commission of the homicide for which he was on trial. *The State v. Sneed*, 138.
12. ——— : DRUNKENNESS. Drunkenness is inadmissible in evidence on a criminal trial either to show that no crime was committed or to reduce its grade. *Ib.*
13. ——— : BURGLARY AND LARCENY : PRACTICE. In a prosecution for burglary and larceny, the defendant may be acquitted of the one and convicted of the other. *The State v. Kennedy*, 341.
14. ——— : INSTRUCTION : RECENT POSSESSION OF STOLEN PROPERTY : PRESUMPTION. An instruction that one found in the possession of property recently stolen is presumed to be the thief, and if he fails to account for his possession in a manner consistent with his innocence, the presumption becomes conclusive against him, is properly given in a case where there is no evidence as to the good character of the defendant. *Ib.*
15. PRACTICE, CRIMINAL : JURISDICTION : CHANGE OF VENUE. Where the judge of the St. Louis criminal court is disqualified for any of the reasons mentioned in Revised Statutes, section 1877, he is authorized by Revised Statutes, section 1881, to call in the judge of another circuit to try a defendant's application for a change of venue, and the judge of such other circuit becomes thereby possessed of jurisdiction of the cause until its final determination, notwithstanding the withdrawal of the application by his consent, after the cause has been reversed in the Supreme Court. *The State v. Hayes*, 344.
16. CRIMINAL PRACTICE : VARIANCE. The wound, on a trial for murder, may be proved by the state to have been made on a part of the body different from that alleged in the indictment. *The State v. Waller*, 402.
17. ——— : OBJECTION TO JUROR. The objection that one of the jurors was not a citizen of the county where the trial was had comes too late under the statute (R. S., sec. 2778), after his acceptance and qualification as a juror. *Ib.*

18. ———: EVIDENCE. Where no objection is made nor exception saved to the cross-examination of a defendant in a criminal case, as to matters not testified to in chief, the same is waived. *The State v. Mills*, 417.
19. PRACTICE, CRIMINAL : DEFENDANT AS A WITNESS : EVIDENCE. Where the defendant in a criminal cause offers himself as a witness, he is subject to the same rules and tests, and can be impeached in the same manner as any other witness, except that he cannot be cross-examined as to any matter not referred to by him in his examination in chief. *The State v. Palmer*, 568.
20. ———: EVIDENCE : MORAL CHARACTER. If the defendant does not offer himself as a witness, the state cannot attack his general moral character, unless he first introduces evidence in his own behalf in that regard. And the state need proceed no further than to elicit from the witness that defendant's general moral character is bad, leaving defendant to cross-examine the witness as to particulars, if he so desires. *Ib.*
21. ———: INSTRUCTION. Before the jury are at liberty to disregard the testimony of a witness, they must believe that such witness has wilfully and knowingly sworn falsely to a material fact in the case, and there must be a sufficient basis in the testimony to warrant the giving of an instruction to that effect. *Ib.*
22. ———: ———: DEFENDANT ACTING ON APPEARANCES. A defendant who acts in self-defence in a moment of apparently impending peril is not required to nicely gauge the proper *quantum* of force necessary to repel the assault of his assailant, but may act upon appearances and use such force as he had reasonable cause at the time to believe was necessary. *Ib.*
23. ———: ———. The evidence in this case held sufficient to justify the giving of instructions for murder in the first and second degrees. *Ib.*
24. ———: ———: EVIDENCE. The defendant in a criminal case has a right to testify as to the intent with which he acted, and his testimony for the purpose of instructing the jury occupies the same footing as that of any other witness, and where he testifies that he did not intend to kill the deceased, he is entitled to an instruction for a lower grade of homicide than murder in either degree. *Ib.*
25. ———: INSTRUCTIONS. It is the duty of the trial court in a criminal cause to give all necessary instructions, whether asked to do so or not. *Ib.*
26. ———: CHANGE OF VENUE. When a change of venue is awarded in a criminal cause the court should order the removal of the body of the defendant to the county to which the venue is changed. *R. S.*, sec. 1867. But a failure to then make the order of removal will not deprive the court of the right to make it afterwards. *The State v. Gleason*, 582.

27. — : JURORS. The objection that the jurors who tried the defendant were not of the standing jurors selected by the county court, held not well taken, it not appearing but that such latter jurors were engaged in the trial of other causes. *Ib.*
28. — : —. The statute with respect to the manner of selecting jurors is directory. *Ib.*
29. — : —. The trial court has the right to direct its officers to summon additional jurors or an entire panel as the dispatch of business may demand. *Ib.*
30. — : CHANGE OF VENUE. The statute (R. S., sec. 1856) confers no authority to award a change of venue to another circuit, where the ground of the change is the prejudice of the inhabitants of the county in which the cause is pending. *The State v. Gabriel*, 631.
31. — : —. An order of the court, improvidently made in such case, transferring the venue to another circuit, is a nullity. The court can set it aside and transfer the cause to another county in the circuit. *Ib.*
32. — : VARIANCE. Where one is indicted in the common form for grand larceny, an instruction is improper which authorizes a conviction under Revised Statutes, sec. 1315, if the property was lost and the defendant converted it to his own use with felonious intent. *Ib.*
33. — : PETIT LARCENY. It is only where the evidence shows, on a trial for grand larceny, that the value of the property taken would constitute petit larceny that the defendant may be convicted of the latter offence under Revised Statutes, section 1315. *Ib.*
34. —. Revised Statutes, section 1654, authorizing a conviction of an offence inferior in degree to the one charged in the indictment, where the latter consists of different degrees, has reference to cases where the evidence shows the higher offence belongs to homicidal crimes, etc. *Ib.*

PRACTICE IN SUPREME COURT.

1. PRACTICE : CHANGE OF VENUE. On an application for a change of venue, it appeared that the same was sworn to by a nominal party to the suit ; that the prejudice of the inhabitants was alleged to be against him alone, and also that a number of counter affidavits were filed, but they were not preserved in the record : *held*, that under these facts the Supreme Court could not say that error was committed in overruling the application. *Buchan v. Broadwell*, 31.
2. — : APPEAL FROM COURT OF APPEALS. In a cause appealed from a court of appeals, the judgment if right, will be affirmed, although

said court may have assigned other than the correct reasons therefor. *Bank of Commerce v. Hoerber*, 37.

3. ATTACHMENT: PRACTICE IN SUPREME COURT. The Supreme Court will not reverse a judgment in an attachment suit on the ground that plaintiff's motion to strike out the plea in abatement should have prevailed, it appearing that the plaintiff had a fair trial on the plea and failed to sustain the issues joined by any evidence on his part. *Missouri Glass Co. v. Copeland Sewing Machine Co.*, 57.
4. CRIMINAL PRACTICE: ARRAIGNMENT OF DEFENDANT. The Supreme Court will reverse a judgment in a criminal case where the record fails to show an arraignment of the defendant. *The State v. Vanhook*, 105.
5. PRACTICE IN SUPREME COURT. The Supreme Court will not in an action at law, where the evidence is conflicting and no declarations of law were asked or given, review the finding and judgment of the trial court. *Thies v. Garbe*, 146.
6. ———. In an equity case the Supreme Court will defer somewhat to the finding of facts of the trial court. *Bank of Pike County v. Murray*, 191.
7. PRACTICE: FINDING OF JURY, WHEN SET ASIDE. When the right of the jury to pass upon the credibility of witnesses and weight of evidence is abused by them, the trial court may set aside their verdict on proper motion, and take the verdict of another jury, or the Supreme Court will grant a new trial where it appears that the verdict is so clearly against the weight of evidence that it must have been the result of passion or prejudice. *Hipsley v. The K. C., St. J. & C. B. Ry. Co.*, 348.
8. PRACTICE IN SUPREME COURT: BILL OF EXCEPTIONS. Where there is no order of the court authenticating the bill of exceptions, the Supreme Court will consider nothing but the record proper. *Roesler v. The Citizens' Bank of Memphis*, 565.
9. ———. The Supreme Court will not disturb a verdict on the issue of the *bona fides* of a sale of personal property where the evidence thereon is conflicting. *Frederick v. Allgaier*, 598.
10. ———: EXCEPTIONS: INSTRUCTIONS. Where no exceptions are saved at the time to the action of the court in refusing instructions they will not be considered in the appellate court. *The State v. Bayne*, 604.

PREFERRED DEMAND.

See TRUSTS AND TRUSTEES, 7.

PRESUMPTIONS.

1. ——— : PRESUMPTIONS : CERTIORARI. In proceedings by *certiorari* it will not be presumed from a record which shows merely the removal of an officer that such removal was for cause shown. *The State ex rel. v. Police Com'rs*, 144.
2. OFFICERS, PRESUMPTIONS AS TO ACTS OF. Presumptions are in favor of the regularity of the acts of public officers, and this rule applied in this case to officers taking acknowledgment of deeds. *Addis v. Graham*, 197.
3. PRESUMPTION. One approaching a railroad crossing has a right to presume that the railroad will obey the law in notifying him of the approach of its train by ringing its bell or sounding its whistle, when within a quarter of a mile of the crossing. *Petty v. The H. & St. J. Ry.*, 306.
4. ——— : INSTRUCTION : RECENT POSSESSION OF STOLEN PROPERTY : PRESUMPTION. An instruction that one found in the possession of property recently stolen is presumed to be the thief, and if he fails to account for his possession in a manner consistent with his innocence the presumption becomes conclusive against him, is properly given in a case where there is no evidence as to the good character of the defendant. *The State v. Kennedy*, 341.
5. OFFICER : ATTACHMENT : PRESUMPTION. Where under a writ of attachment, directing a sheriff to levy on the property of the defendant therein, the officer seizes property in possession of a stranger to the writ, such seizure is *prima facie* wrongful as against such party in possession, and in an action therefor by the latter against the officer on his bond, no presumption obtains in favor of the officer that he did his duty in making the levy. *The State ex rel. v. Hope*, 430.
6. ——— : ——— : ———. It is only where the controversy is between the officer and party to the writ that such presumption exists. *Id.*
7. PERSONAL PROPERTY, POSSESSION OF. Possession of personal property is presumptive evidence of title. *Id.*
8. PRESUMPTIONS. Every one is presumed to govern himself by the rules of right reason, and to properly acquit himself of his engagements and his duty. And the same presumptions are indulged in favor of one occupying no official station, as in favor of one acting in an official capacity. *Lenox v. Harrison*, 491.
9. PRACTICE : PRESUMPTIONS. The cause having been tried by the court without a jury, and no declarations of law having been asked or given, it will be presumed on appeal, that the court entertained correct views of law, and if there is substantial evidence to support the judgment, it will be affirmed. *Johnson v. Lullman*, 567.

10. CORPORATIONS : STOCK : PRESUMPTIONS. The presumption is that a certificate of stock in the usual form is full paid, and a purchaser who takes it without notice, is not liable to creditors if the company's representations that the stock is full paid are false. *Ib.*
11. DEED : PRESUMPTION : WAIVER. A clause in a city ordinance, by authority of which a deed to the city for certain wharf premises was made, provided that the deed should be binding on the city as soon as the owners of fifteen hundred feet of the wharf should have executed the deed to the satisfaction of the mayor. *Held*, in ejectment by the city to recover the premises, (1) that in the absence of any evidence to the contrary, it must be presumed that the deed was delivered and signed by the prescribed number of property owners, and (2) that the city having entered upon the performance of the stipulations on its part contained in the deed, waived the stipulation in its favor in the ordinance. *The City of St. Louis v. Wiggins Ferry Co.*, 615.

PRINCIPAL AND AGENT.

1. AGENCY, REVOCATION OF. A principal can in general at his pleasure revoke the authority of its agent. *The State ex rel. Walker v. Walker*, 279.
2. ———. When the state employs one as its agent, it has the same power of revocation that is possessed by an individual. *Ib.*
3. STATE CLAIM AGENT : REPEAL OF ACT OF MARCH 19, 1881. The appointment of one under the act of the General Assembly of March 19, 1881 (Laws, p. 163), as agent of the state to collect certain claims against the United States, was revoked by a repeal of said act. *Ib.*
4. ——— : ———. The fact that such agent was to be compensated for his services out of the amount collected, did not confer upon him such an interest in the subject matter of the agency as to render the latter irrevocable. *Ib.*
5. INSURER : ACTS OF AGENTS. The authority of the agents of an insurance company to consent to the modification of the terms of a policy may be inferred from the course of dealing with the insured and the recognition of these acts by the company. *Day v. The Mechanics' & Traders' Ins. Co.*, 325.
6. MARRIED WOMAN, SEPARATE PROPERTY OF : PRINCIPAL AND AGENT : ACTS OF HUSBAND. A husband acting in the matter of arbitration proceedings connected with the separate estate of his wife will be regarded as her agent, and she will be considered a *feme sole* with respect to such property. *Keating v. Korfhage*, 524.

See ATTORNEY AND CLIENT

PRINCIPAL AND SURETY.

1. SURETY : FRAUDULENT CONVEYANCE. A surety may buy property of his principal to protect himself on his suretyship, and may do this although the purchase may operate to hinder and delay creditors of the principal of their demands, and although the surety knew that the debtor intended the sale to have that effect, *provided* the surety did not participate in the fraudulent purpose of the debtor. *Albert v. Besel*, 150.
2. SHERIFF ACTING AS TRUSTEE IN DEED OF TRUST, LIABILITY OF SURETIES OF. Where parties in a deed of trust provide that in the event the trustee named therein shall refuse to act the then sheriff of the county shall execute the trust, and the trustee refuses to act, and the sheriff sells the land and fails to pay over a portion of the proceeds, his sureties are not liable on his official bond for such failure. But it would be otherwise if the sheriff were appointed in an appropriate proceeding by the circuit court to execute the trust. *The State ex rel. Chase v. Davis*, 585.

See BANK.

PROBATE COURT.

See ADMINISTRATION, 1.

PROMISSORY NOTE.

1. PROMISSORY NOTE : HOLDER FOR VALUE. One who takes a note as collateral security for a debt then created is a holder for value. *Deere v. Marsden*, 512.
2. ——— : ———. So one will be a holder for value who so takes a note for a pre-existing debt, if there is an express agreement on his part to forbear suit until the collateral shall mature. *Ib.*

PUBLICATION.

1. CIVIL PRACTICE : ORDER OF PUBLICATION. The order of publication made against non-resident, absent or unknown defendants, must designate therein the paper most likely to give notice to the person to be notified. (R. S., sec. 3500). *Otis v. Epperson*, 131.
2. ——— : ———. When the order of publication is made in term by the court, the order so made must be published in the paper selected by the court. *Ib.*
3. ——— : ——— : JURISDICTION. Where in such case the order made by the court is not published, and instead thereof one made by the clerk is substituted and published, the court will obtain no jurisdiction over the defendants intended to be notified. *Ib.*

QUANTUM MERUIT.

1. SERVANT, DISCHARGE OF: ELECTION. Where a servant is wrongfully discharged by his master, he may sue for a breach of the contract, or he may elect to treat the contract as rescinded, and recover on a *quantum meruit* for the services rendered. *Ehrlich v. The Aetna Life Ins. Co.*, 249.
2. CONTRACTOR, WHEN PREVENTED FROM COMPLETING WORK: REMEDIES. A contractor who has been prevented from completing his work, may waive the action for damages and sue for the value of the work done and materials furnished, and he is not, in such case, restricted to a *pro rata* share of the contract price. *Ib.*
3. QUANTUM MERUIT: PLEADING. It is no objection in such action that the petition sets out the contract and a compliance with its terms and the termination of the contract by defendant, provided it shows that the plaintiff elects to treat it as canceled and seeks to recover for the services rendered. *Ib.*
4. ———: ———. Where the petition counts on both the theory of a breach of the contract and a *quantum meruit*, the remedy of the defendant is by a motion to elect. *Ib.*

QUO WARRANTO.

1. QUO WARRANTO: OFFICE: BURDEN OF PROOF. In a *quo warranto* proceeding against one for usurping an office, the burden is on the latter to show title thereto. *The State ex rel. v. McCann*, 386.
2. ———: RETURN, SUFFICIENCY OF. The return in such proceeding for usurping the office of justice of the peace, is insufficient if it fails to show that the respondent qualified under the appointment by virtue of which he claims the office. *Ib.*
3. ———. A *quo warranto* proceeding is not a contested election case within the meaning of the constitution, and ballots cannot be inspected therein. *The State ex rel. v. Francis*, 557.
4. ———. A *quo warranto* proceeding adjudges the right to the office to no one; it only determines whether the person exercising it is a usurper and ousts him if the judgment is in favor of the relator. *Ib.*

RAILROADS.

1. CARRIER OF PASSENGERS. The undertaking of a common carrier of passengers is to carry the latter without fault or negligence, but the carrier is not an insurer against accidents. *Leslie v. The W., St. L. & Pac. Ry. Co.*, 50.
2. NEGLIGENCE: ALIGHTING FROM CAR. For one voluntarily and not

to avoid some threatened danger, to jump from a train of steam cars while in rapid motion, is negligence, but to step from a car, while in motion, to a station platform, may or may not be negligence. *Ib.*

3. QUESTION OF FACT. Whether the latter is or is not negligence is a question of fact for the jurors to determine from the attending circumstances, and in such case the better practice is to submit the question, by leaving it to the jurors to determine whether a prudent person, in a like situation and under similar circumstances, would have made the step or leap. *Ib.*
4. PRACTICE: INSTRUCTIONS: NEGLIGENCE. In an action for injuries resulting from the alleged negligence of defendant, and in which the issue of plaintiff's contributory negligence is made, an instruction is erroneous which hypothecates the facts as to defendant's negligence, and authorizes a verdict for plaintiff therein without in the same instruction limiting such right of recovery to the absence of such contributory negligence on the part of plaintiff. *Sullivan v. H. & St. J. Ry. Co.*, 169.
5. ———: ———: ———. Such defect in the instruction is not cured by other instructions given in the case which so limit plaintiff's right of recovery if he was guilty of contributory negligence. (*Black and Norton, JJ.*, dissenting). *Ib.*
6. NEGLIGENCE: RAILROAD: PASSENGER. A drover transported over a railroad on a pass for the purpose of taking care of his stock on the train is a passenger, and the railroad cannot stipulate for exemption from liability for injuries to him caused by its negligence. *Carroll v. The Mo. Pac. Ry. Co.*, 239.
7. MASTER AND SERVANT. The trial court held to have rightly declared as a matter of law, that the relation of master and servant did not exist between the railroad and deceased in this case. *Ib.*
8. CONSTITUTION: REVISED STATUTES, SECTION 2121. The second section of the damage act (R. S., sec. 2121) which authorizes the recovery of five thousand dollars in cases of death of persons occasioned by the negligence of railroads, etc., is constitutional. *Ib.*
9. ACTION BY WIFE FOR DEATH OF HUSBAND: COLLECTION OF INSURANCE MONEY BY HER. The fact that plaintiff's husband had his life insured, payable to her, and that after his death she collected the insurance money, is no defence to an action on said statute. *Ib.*
10. RAILROAD: ROAD CROSSING: RINGING BELL, ETC. A railroad is guilty of negligence in not ringing the bell, or sounding the whistle of its locomotive at a distance of eighty rods from a road crossing. *Petty v. The H. & St. J. Ry. Co.*, 306.
11. ———: ———: ———: CONTRIBUTORY NEGLIGENCE. Although one is injured by reason of the failure of the servants of the railroad to comply with the statutory requirement as to ringing the

bell and sounding the whistle of its locomotive, he cannot recover if his own negligence directly contributed to the injury. *Ib.*

12. CONTRIBUTORY NEGLIGENCE, WHEN A QUESTION FOR THE JURY. When the undisputed facts relied on to establish contributory negligence and such as may, in the judgment of sensible men, lead to different conclusions thereon, the question should be submitted to the jury. *Ib.*
13. RAILROAD CROSSING: TRAVELER. Negligence is not imputable to one for attempting to drive over a railroad crossing without stopping and looking for a train, when by doing so he could not have seen the train which occasioned the injury. *Ib.*
14. ——— : QUESTION FOR THE JURY. Whether or not the deceased, by stopping and listening, could have heard the train, was, under the circumstances of this case, a question for the jury. *Ib.*
15. ———. One approaching a railroad crossing has a right to presume that the railroad will obey the law in notifying him of the approach of its train by ringing its bell or sounding its whistle, when within a quarter of a mile of the crossing. *Ib.*
16. CONTRIBUTORY NEGLIGENCE. Contributory negligence is a matter of defence, and need not be alleged or proved by the plaintiff. *Ib.*
17. RAILROADS: COMMON CARRIERS: PERSONAL INJURIES: NEGLIGENCE: BURDEN OF PROOF. Where in an action by a passenger against a railroad company for damages for injuries caused by the derailment of the latter's train, the evidence shows that the plaintiff was injured without any fault on his part, a *prima facie* case is made out for him, and the *onus* is cast upon the defendant of relieving itself from responsibility by showing that the injury was the result of an accident which the utmost skill, foresight and diligence could not have prevented. *Hipsley v. The Kansas City, St. J. & Council Bluffs Ry. Co.*, 348.
18. ——— : PERSONAL INJURIES: EVIDENCE. In an action by a passenger against a railroad company for damages for injuries sustained by the derailment of the latter's train, evidence that defendant, several months after the accident, repaired its road in various places by putting in new rails and ties is inadmissible; and the plaintiff's evidence should be confined to the condition of the road bed at the place of and in the immediate vicinity of the accident at the time it occurred, and he should not be allowed to show that accidents had previously occurred on other parts of defendant's road. *Ib.*
19. NEGLIGENCE: RAILROAD: VICE-PRINCIPAL. Where a road master of a railroad, having general superintendence of its track, while engaged in superintending and directing the removal of a wrecked

train, but not in the manual work of removing a wreck, gives a wrong signal to the engineer of a train assisting in removing the wreck, whereby a laborer engaged in the work of removal is injured, the railroad is liable therefor. (Following *Moore v. Railroad*, 85 Mo. 588). *Hoke v. The St. Louis, Keokuk & Northern Ry. Co.* 360.

20. FELLOW SERVANT; VICE-PRINCIPAL. The road master was not a fellow servant of the one injured in the transaction in which the injury was received, but represented the company therein as vice-principal, or *alter ego*, and his negligence in the matter causing the injury was that of the company. *Ib.*
21. NEGLIGENCE: RAILROAD: PERSON ON PRIVATE RIGHT OF WAY: KNOWLEDGE OF BY SERVANTS OF COMPANY: DUTY TO AVOID ACCIDENT. Notwithstanding one who was killed by being run over by a tender and engine was guilty of negligence, in being at the time on the private right of way of the railroad, still if those in charge of the tender and engine saw him in an exposed and dangerous position in time to have avoided the injury, then they were bound to use all reasonable efforts consistent with their own safety and that of the engine and tender to avoid such injury. *Rine v. The C. & A. Ry. Co.*, 392.
22. ———: ———: ———: ———. The liability of the company in such a case is limited to negligence and want of care occurring after the exposed and dangerous position of the injured party came to the knowledge of the servants charged with the want of care. *Ib.*
23. ———: ———: ———: ———. The company is not liable in such case on the theory that the servants of the company might, by the exercise of ordinary care, have become aware of the negligence of the deceased and his dangerous condition in time to have avoided the accident, and failed to do so. *Ib.*
24. ———: ———: ———: ———. This case distinguished in the latter respect from the cases of *Frick v. Ry.*, 75 Mo. 595, and *Kelly v. Ry.*, 75 Mo. 138. *Ib.*
25. RAILROADS: TRAVELLER WITH TEAM: CROSSING TRACK. A traveller with a team, crossing a railroad where it intersects a highway, is not required to stop absolutely and always, or to fasten his team and go forward on foot to a point where he can look up and down the track. *Kelly v. The C. & A. Ry. Co.*, 534.
26. ———: ———: ———: DUTY TO STOP AND LISTEN. Where such traveller, however, is about to cross a railroad track on a public street crossing and at hours when trains are passing, he should, if he cannot see the track, listen, and if necessary for that purpose, on account of the noise made by the wagon, he should stop and then listen for the train before blindly venturing on the track. *Ib.*

27. ——— : FAILURE TO RING BELL AT CROSSING : EVIDENCE. In an action against a railroad for injuries to plaintiff's team by one of its trains by reason of the failure to ring the bell of the locomotive within eighty rods of the crossing, evidence to show connection between such failure to ring the bell and the injury to the team is irrelevant and unnecessary. *Ib.*
28. ——— : KILLING STOCK : MEASURE OF DAMAGES. The owner of cattle negligently killed by a railroad train can only recover the difference between their value before the injury and immediately thereafter, and it is his duty to use reasonable effort to prevent loss after the injury and reduce, as much as possible, the damage; and where such cattle are available after the injury, he cannot abandon them and then claim their full value. *Harrison v. Mo. P. Ry. Co.*, 625.
29. ——— : CITY OF ST. LOUIS : CHARTER : ORDINANCE. The city of St. Louis has authority under its charter (2 R. S., p. 1585) to enact an ordinance regulating within its limits the speed and operation of cars and locomotives propelled by steam. *Merz v. Mo. Pac. Ry.*, 672.
30. ——— : ——— : ——— : POLICE POWER. The city, in the absence of any express authority in its charter, would have the right to pass such ordinance by virtue of its general supervision over the police of the city. *Ib.*
31. ——— : ———. The ordinance is applicable where the railroad track is located on the unenclosed private property of the company. *Ib.*
32. NEGLIGENCE : RAILROAD TRACK : CITY ORDINANCE. Notwithstanding a person is guilty of negligence in going on a railroad track without looking or listening for a train, when he could have seen or heard it if he had so looked or listened, still the company will be liable for his death caused by backing its train on him, if it could have avoided the accident by having observed the provisions of an ordinance of the city in which the accident occurred, requiring it to have a man stationed on the end of its train to give danger signals when backing through the city. *Bergman v. St. L., I. M. & S. Ry.*, 678.
33. ——— : ——— : RECOVERY NOTWITHSTANDING FAILURE TO LOOK AND LISTEN. While it was negligence on the part of the deceased to go on the track without looking or listening for a train, the railroad is still liable, notwithstanding that fact, if it either knew, or might have known, by the exercise of ordinary diligence, of the danger of the deceased in time to have prevented the accident. *Ib.*

REASONABLE TIME.

See CONTRACTS. 19. 20.

RECEIVER.

See CORPORATIONS, 3.

RECITALS OF RECORD.

See INSANE PERSON.

RECORD AND JUDICIAL PROCEEDINGS.

See WILLS, 3.

RECORDER OF DEEDS.

DEEDS. The recorder of deeds is not required to copy the seal of the officer who took the acknowledgment of the deed. *Addis v. Graham*, 197.

RELEASE.

See DEBTOR AND CREDITOR.

RENTS AND PROFITS.

1. **EJECTMENT : RENTS AND PROFITS : DAMAGES.** In an action of ejectment by one tenant in common against his co-tenant, where plaintiff recovers possession of an undivided one-third of the premises, he is also entitled to recover damages, rents and profits from the date of the ouster, subject to the limitations in section 2252, Revised Statutes. *Falconer v. Roberts*, 574.
2. **THE AMOUNT** of damages, rents and profits assessed by the court held to be correct under the evidence. *Ib.*

RES GESTAE

See EVIDENCE, 38, 39, 40.

REVENUE.

1. **REVENUE : ASSESSOR'S BOOK, VERIFICATION OF : JURISDICTION : TAX SALE.** The failure of the county clerk to sign and seal the assessor's book, as required by section 65, page 1171, 2 Wagner's Statutes, renders it of no official validity, and makes the collector's report of the delinquent list to the county court, as provided by section 190, page 1198, 2 Wagner's Statutes, unauthorized and invalid ; and the county court in such case, is without jurisdiction and powerless to act. *Howard v. Heck*, 456.

2. **TAX SALE, IMPEACHMENT OF VALIDITY OF: EVIDENCE.** The validity of a sale of land for taxes may be contradicted by showing any substantial non-compliance with the revenue act, and all books, papers and records in the county clerk's office, pertaining to the subject of taxation, may be introduced in evidence for that purpose. Wag. Stat. sec. 211, p. 1204; *Ewart v. Davis*, 76 Mo. 129. *Ib.*

ROADS AND HIGHWAYS.

1. **PROCEEDING TO ESTABLISH PUBLIC ROAD: ACT OF 1868: JURISDICTIONAL FACTS.** Proceedings to establish a public road under the road law of 1868 (Laws 1868, p. 157), must show that the petition was signed by "twelve householders of the township or townships in which the road is desired, three of whom shall be of the immediate neighborhood," and that the notices of the intended application for the road had been posted for "twenty days prior thereto." These are jurisdictional facts and must appear on the record of the proceeding, otherwise the latter is void; certainly so as against land owners who did not relinquish their rights of way. *Zimmerman v. Snowden*, 218.
2. **PUBLIC ROAD, ACQUISITION OF BY USE.** The public may acquire the right to the use of a road on the land of another from its use and adverse occupancy, acquiesced in by the land owner for a period of ten years. *Ib.*
3. ———: ———. In determining what is a sufficient use by the public of the road regard must be had to the condition of the surrounding lands and their state of improvement. The circumstances that travel for the most part departed from the line of the real location of the road to avoid a hill is not a controlling one to defeat the claim of the public. *Ib.*

ST. LOUIS.

1. **ST. LOUIS CITY: CHARTER: ARCHITECTS, LICENSING OF.** The city of St. Louis has the authority, under its charter (art. 3, subdiv. 5, sec. 26), to require a license of a person exercising the business of an architect. *The City of St. Louis v. Herthel*, 128.
2. **POWER OF POLICE COMMISSIONERS.** The power of the police commissioners to appoint a chief of police "for such time as the board may determine," does not include the power to discharge and appoint a chief of police at their pleasure. *The State ex rel. v. Police Com'rs*, 144.
3. ———. An appointment of a chief of police without specifying the duration of the term is not void, and the commissioners cannot remove such an appointee at their pleasure. *Ib.*
4. ———. A chief of police cannot be removed by the commissioners before the expiration of his term of office, except for specified causes. *Ib.*

5. CHIEF OF POLICE : TERM OF OFFICE. The statutory limitation of the term of office of a chief of police is four years where the term of his tenure is not otherwise fixed by the order of his appointment. *Ib.*
 6. FEES IN CASES OF FELONIES : STATUTE : CITY OF ST. LOUIS. Fees collected from the state by the clerk of the criminal court of the city of St. Louis, in cases of felonies and not called for by the persons entitled to them, should, under Revised Statutes, sections 5633 to 5639, be paid into the city treasury. *The City of St. Louis v. Clabby*, 573.
 7. RAILROADS : CITY OF ST. LOUIS : CHARTER : ORDINANCE. The city of St. Louis has authority under its charter (2 R. S., p. 1585) to enact an ordinance regulating within its limits the speed and operation of cars and locomotives propelled by steam. *Merz v. Mo. Pac. Ry. Co.*, 672.
 8. ——— : ——— : ——— : POLICE POWER. The city, in the absence of any express authority in its charter, would have the right to pass such ordinance by virtue of its general supervision over the police of the city. *Ib.*
 9. ——— : ———. The ordinance is applicable where the railroad track is located on the unenclosed private property of the company. *Ib.*
 10. CONSTITUTION. Such ordinance is not in conflict with either the state or federal constitution. *Ib.*
 11. CHARTER OF ST. LOUIS CITY : ORDINANCE. The provision in the charter of the city of St. Louis that "no bill shall contain more than one subject, which must be clearly expressed in its title," was intended to prevent the practice of joining in the same ordinance incongruous subjects having no relation or connection with each other, and foreign to the subject embraced in the title. *Bergman v. The St. L., I. M. & S. Ry. Co.*, 678.
 12. ———. It does not prevent uniting in the bill matters germane to the general subject expressed in its title. *Ib.*
- SCHEME AND CHARTER : INSANE ASYLUM : PAY OF PHYSICIAN : CONTRACT.
Howard v. City of St. Louis, 656.

ST. LOUIS COURT OF APPEALS,

See APPEALS, 2.

ST. LOUIS CRIMINAL COURT.

See ST. LOUIS, 6.

SALE.

1. DEED OF TRUST : SALE : TITLE. A sale under a deed of trust where it has not been advertised for the time required by such deed, passes no title. *Siemers v. Schrader*, 20.
2. ——— : SALE : WILL. Where a sale is required to effect a partition of lands under a will, the proceeds will stand in lieu of the land and the amount of the sale, and not the value of the land fixed by the commissioners, will determine the sum to go into the computation for division. *Turpin v. Turpin*, 337.
3. SALE : FRAUD ON CREDITORS. A sale of goods is invalid as against creditors where the vendor makes the sale with the intent to hinder, delay or defraud them and the vendee at the time of his purchase knew of such intent of the vendor. *Frederick v. Allgaier*, 598.

See TAX SALE.

SCHEME AND CHARTER.

See ST. LOUIS.

SEDUCTION.

——— : SEDUCTION OF FEMALE UNDER PROMISE OF MARRIAGE : PRIOR ACTS OF UNCHASTITY OF PROSECUTRIX. On the trial of an indictment, under Revised Statutes, section 1259, for seducing a female under promise of marriage, it is competent for the defendant to show that prior to the time of the alleged seduction, the prosecutrix was guilty of acts of lewdness and unchastity with other men than the defendant. (Overruling *The State v. Brassfield*, 81 Mo. 151.) *The State v. Patterson*, 88.

SHERIFF.

SHERIFF ACTING AS TRUSTEE IN DEED OF TRUST, LIABILITY OF SURETIES OF. Where parties in a deed of trust provide that in the event the trustee named therein shall refuse to act the then sheriff of the county shall execute the trust, and the trustee refuses to act, and the sheriff sells the land and fails to pay over a portion of the proceeds, his sureties are not liable on his official bond for such failure. But it would be otherwise if the sheriff were appointed in an appropriate proceeding by the circuit court to execute the trust. *The State ex rel. Chase v. Davis*, 585.

SLANDER.

1. SLANDER ; ACTIONABLE WORDS. Any charge of dishonesty against

an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable. *Noeninger v. Vogt*, 589.

2. — : —. A general charge against one that he is a murderer is actionable. *Ib.*
3. — : ALLEGATA AND PROBATA. In an action for slander, the words proved must substantially correspond with those charged in the petition. *Ib.*
4. — : — : IMMATERIAL VARIANCE. If the words charged to have been spoken are proved, but with the omission or addition of others not varying the sense, the variance is immaterial. *Ib.*
5. — : — : EQUIVALENT WORDS INSUFFICIENT. It is not sufficient, however, that the words proved are of equivalent meaning with those charged. They must be substantially the same words charged in the petition. *Ib.*
6. — : — : —. The rule last stated must of necessity apply to the words in the vernacular in which they are uttered. If the proof shows that words alleged to have been spoken in a foreign language are correctly translated in the petition, it is no ground for a demurrer to the evidence that they are also translated by the witnesses by the use of equivalent words and expressions. *Ib.*
7. FOREIGN WORDS: QUESTION OF FACT. The meaning of the words charged to have been spoken in a foreign language is a question of fact, to be proved by those conversant with both languages. *Ib.*
8. SLANDER: WORDS IMPUTING DISHONESTY IN BUSINESS: SPECIAL DAMAGES. Language which imputes to one fraud or want of integrity in his business is actionable *per se* and special damages need not be alleged. *Ib.*
9. — : — : LOSS OF BUSINESS. In such case a general diminution or loss of business may be proved; certainly so, where there is a general allegation to that effect in the petition. *Ib.*
10. — : — : —. It is not necessary to name particular customers who have ceased to do business with the plaintiff. *Ib.*
11. — : — : —. The plaintiff should not only be allowed to show loss of business, but should also be permitted by his evidence to trace that loss, if he can, to the alleged slander. *Ib.*
12. — : — : REPETITION OF SLANDEROUS WORDS. Plaintiff may also show a repetition by the defendant of the slanderous words, to prove malice in fact, and this may be done, it seems, although the repetition was made after commencement of suit. *Ib.*

SPECIAL TAX BILL.

1. SPECIAL TAX BILL : PLEADING : EVIDENCE. The petition in this case, which was a suit to enforce the collection of special tax bills, held good and objections to offers of evidence made at the trial properly overruled. *Buchan v. Broadwell*, 31.
2. ——— : CHARTER OF KANSAS CITY : CONSTITUTION. Section 1, article 8, of the charter of the City of Kansas, which provides that "the common council on the petition of residents of Kansas City, who own a majority of the front feet on a street to be graded, may order the same to be graded at the expense of the property owners," is not a discrimination against non-resident owners and for that reason unconstitutional. *Ib.*
3. ——— : JUDGMENT : INTEREST. A judgment on special tax bills held, under the charter of Kansas City, to properly bear fifteen per cent. interest. *Ib.*

SPECIFIC PERFORMANCE.

1. EQUITY. Where reformation and specific performance of deeds and contracts respecting the sale of lands will be decreed by a court of equity between the original parties thereto, similar relief will in general be given in suits between parties claiming under them. *Hagman v. Shaffner*, 24.
2. CONTRACT FOR SALE OF LAND : SPECIFIC PERFORMANCE : MEMORANDUM. A memorandum of a contract for the sale and conveyance of land, although signed only by the party to be charged, when sufficiently clear and certain in its terms, affords a competent basis for a suit for specific performance. *Mastin v. Grimes*, 478.
3. ——— : ——— : ———. Where the memorandum stated that the residue of the purchase money "is to be paid as soon as abstract to said lots can be examined," the abstract to be furnished by the vendor, the law would imply that after the examination of the abstract, a reasonable time was to be allowed the vendee in which to make the payment. *Ib.*
4. SPECIFIC PERFORMANCE : ACTION BY VENDEE : DEFENCE. In an action by a vendee for the specific performance of a contract for the sale and conveyance of land, the vendor set up as a defence that the plaintiff for the purpose of preventing a compliance with the terms of the contract on his part, had falsely and fraudulently pretended that defendant's title to the land was imperfect. *Held*, that the failure of the vendor to rescind the contract and to return or to offer to return the portion of the purchase money which he received was a bar to said defence. *Ib.*

STATE CLAIM AGENT.

1. STATE CLAIM AGENT : REPEAL OF ACT OF MARCH 19, 1881. The ap-

pointment of one under the act of the general assembly of March 19, 1881 (Laws, p. 163), as agent of the state to collect certain claims against the United States, was revoked by a repeal of said act. *The State ex rel. Walker v. Walker*, 279.

2. ———: ———. The fact that such agent was to be compensated for his services out of the amount collected, did not confer upon him such an interest in the subject matter of the agency as to render the latter irrevocable. *Id.*

STATUTES CITED AND CONSTRUED.

REVISED STATUTES OF 1879.

Section 188, see page 323.	Section 2508, see page 305.
Section 666, see page 409.	Section 2691, see page 225.
Section 809, see page 398.	Section 2692, see page 225.
Section 879, see page 266.	Section 2695, see page 438.
Section 917, see page 168.	Section 2698, see page 225.
Section 1259, see page 90.	Section 2816, see page 391.
Section 1262, see page 123.	Section 2817, see page 391.
Section 1263, see page 123.	Section 2820, see page 391.
Section 1264, see page 123.	Section 2821, see page 391.
Section 1319, see page 643.	Section 3060, see page 649.
Section 1390, see page 343.	Section 3296, see page 305.
Section 1561, see page 606.	Section 3391, see page 340.
Section 1654, see pages 128, 643.	Section 3500, see page 135.
Section 1763, see page 649.	Section 3565, see page 54.
Section 1856, see page 635.	Section 3702, see page 54.
Section 1867, see page 584.	Section 3729, see page 299.
Section 1831, see page 346.	Section 3733, see page 300.
Section 1902, see page 347.	Section 3742, see page 300.
Section 1918, see page 90.	Section 3790, see page 562.
Section 2025, see page 649.	Section 3970, see page 341.
Section 2026, see page 649.	Section 5011, see page 110.
Section 2027, see page 649.	Section 5633, see page 574.
Section 2166, see page 341.	Section 5634, see page 574.
Section 2167, see page 341.	Section 5635, see page 574.
Section 2179, see page 138.	Section 5636, see page 574.
Section 2248, see page 578.	Section 5637, see page 574.
Section 2252, see page 580.	Section 5638, see page 574.
Section 2507, see page 305.	Section 5639, see page 574.

WAGNER'S STATUTES, 1872.

Section 198, see page 119.	Page 1171, see page 458.
Section 221, see page 118.	Section 1369, see page 547.

REVISED STATUTES, 1855.

Section 429, see page 213.	Section 1006, see page 211.
Section 502, see pages 212, 217.	Page 1554, see page 588.

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ACTS OF 1857.

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ACTS 1881.

Page 168, see page 71.

ACTS 1883.

Page 130, see page 200.

ACTS 1885.

Page 205, see page 282.

STOCKHOLDERS.*

1. CORPORATIONS : STOCK : PRESUMPTIONS. The presumption is that a certificate of stock in the usual form is full paid, and a purchaser who takes it without notice, is not liable to creditors if the company's representations that the stock is full paid are false. *Johnson v. Lullman*, 567.
2. ——— : LIABILITY OF STOCKHOLDER : SURRENDER OF STOCK. A stockholder who surrenders unpaid stock to the corporation is not liable thereon to a creditor of the corporation whose demand accrued after the surrender. *Ib.*

STREETS.

See MUNICIPAL CORPORATIONS.

SUBROGATION.

SUBROGATION : MORTGAGE : VOLUNTEER. Before a third party, making payment of a debt secured by mortgage, can be subrogated to the rights of the mortgagee, he must show either that he made the payment at the request of the mortgageor, or to protect some interest of his own, had at the time of the payment. *Norton v. Highleyman*, 621.

SWAMP LANDS.

1. **SWAMP LANDS, POWER OF COUNTIES OVER : STATUTE.** The amendatory act of the general assembly of 1875 (Laws, p. 32), providing that all lands in this state, selected under the act of congress donating swamp lands to the state "be and the same are hereby declared to vest in full title and belong to the counties in which they may lie," did not enlarge the powers of the county courts over the swamp lands. Notwithstanding said act, the counties still held them for the uses and with the power of disposition under the then existing laws. *Sturgeon v. Hampton*, 203.
2. ———. The swamp lands are not the general property of the counties. *Ib.*
3. **SWAMP LANDS, SALES OF : PATENT.** Under the laws (R. S., 1855, p. 1006, secs. 3-4) providing for the sale of swamp lands by sheriffs, under orders of the county court, patents therefor were to be made by the governor, but not until full payment of the consideration therefor. *Ib.*
4. ——— : ——— : **COMMISSIONER.** The county court did not have the power to appoint a commissioner to convey swamp lands, nor could it release a purchaser from the payment of the consideration. *Ib.*
5. ——— : ———. The swamp land laws provide when and how title thereto is to be made. These statutes are exclusive and the method thus prescribed must be pursued. *Ib.*
6. **SWAMP LANDS : ACT OF MARCH 26, 1868.** The act of the legislature approved March 26, 1868 (Laws, p. 67), entitled "An act to perfect the title to lands known as swamp lands," was not intended to make valid a void sale or a deed when the purchaser was not entitled to one. *Ib.*

TACKING DISABILITIES.

1. **STATUTE OF LIMITATIONS : TACKING DISABILITIES.** There can be no tacking of disabilities to escape the bar of the statute of limitations. *Gordon v. Lewis*, 378.
2. ——— : ———. Where a cause of action accrues to a woman

under the disability of coverture, the statute of limitations will begin to run immediately upon her death against her children, notwithstanding their minority. *Ib.*

TAX DEED.

1. **TAX DEED : RECITALS : STATUTE.** A tax deed held not void on its face, because it recited that the sale was made on the eighth day of October, 1873, which could not have been the first Monday of that month, the time for which the sale was required by statute to be advertised. 2 W. S., p. 1196, sec. 183. *Hill v. Atterbury*, 114.
2. ——— : ——— : ———. While the statute requires the sales to be advertised for the first Monday in October it provides for adjourned sales and the statutory form prescribed for tax deeds does not require therein a recital of the adjournment of the sales from day to day. It only requires that the day on which the land conveyed is offered for sale shall be recited in the deed. *Ib.*
3. **TAX DEED VALID ON ITS FACE : SPECIAL STATUTE OF LIMITATIONS : EVIDENCE.** The tax deed being valid on its face and having been recorded for more than three years before the bringing of the suit, the special statute or limitations was a complete defence for defendant and evidence was inadmissible to show that there was no assessment or levy of taxes on the land or any judgment therefor for the year for which the land was so sold for taxes. *Ib.*
4. **CONSTITUTION.** The three years special statute of limitations in reference to tax deeds is constitutional. *Ib.*
5. **TAX DEED, RECITALS IN.** Where it affirmatively appears, from the recitals in a tax deed, that no judgment was rendered against the land sold for taxes and intended to be conveyed by such deed, it is void. *Guffey v. O'Reiley*, 418.
6. **TAX DEED, FORM OF.** Where the statute requires no form of tax deed, the deed must, nevertheless, be adjusted to the facts of the case, and must contain apt and appropriate recitals in order that it may be *prima facie* evidence of such recitals. The deed must affirmatively show upon its face the amount of taxes, interest and costs due upon each tract. *Ib.*

TAX SALE.

TAX SALE, IMPEACHMENT OF VALIDITY OF : EVIDENCE. The validity of a sale of land for taxes may be contradicted by showing any substantial non-compliance with the revenue act, and all books, papers, and records in the county clerk's office, pertaining to the subject of taxation, may be introduced in evidence for that purpose. Wag. Stat., sec. 211, p. 1204 : *Ewart v. Davis*, 76 Mo. 129. *Howard v. Heck*, 456.

TELEPHONE POLES.

See MUNICIPAL CORPORATIONS, 8, 9, 10, 11.

TIME.

1. ——— : TIME : WAIVER. Time is not generally deemed in equity to be of the essence of the contract for the sale and conveyance of land. And even if by express terms a day of payment be fixed and time is declared to be of the essence of the contract, still that is no bar to the time of payment being postponed, or to its being waived altogether. *Mastin v. Grimes*, 478.
2. ——— : ——— : ———. If, after the expiration of the time limited for the performance of the contract, the parties continue to deal together, or to treat the contract as still existing, this will amount to a waiver of the element of time. *Ib.*
3. ——— : NOTICE TO COMPLETE CONTRACT. Where either the vendor or the vendee has improperly and unreasonably delayed in complying with the terms of an agreement for the sale and conveyance of land, the other party may by notice fix the time within which the contract may be completed, but such notice must allow a reasonable length of time for the other party to perform his part of the contract, and if it fail in this respect it may be disregarded. *Ib.*
4. ——— : ———. A notice given by the vendor to the vendee to complete the contract within five days held insufficient under the circumstances in this case. *Ib.*

TITLE.

1. LOSS OF DEED AND RECORD : TITLE OF GRANTEE. Where a deed is executed, acknowledged and recorded, the loss of the deed, and destruction of its record, does not affect the title of the grantee. *Addis v. Graham*, 197.
2. PERSONAL PROPERTY, POSSESSION OF. Possession of personal property is presumptive evidence of title. *The State ex rel. Robertson v. Hope*, 430.

See SALE, 1.

TRESPASS.

- : TRESPASS BY OFFICERS : VOID ORDINANCE. A municipal corporation is not liable for a trespass, committed by its officers in the enforcement of a void ordinance. *Worley v. The Inhabitants of Columbia*, 106.

TRUSTS AND TRUSTEES.

1. MORTGAGEE: TRUSTEE: EJECTMENT. A mortgagee, in the absence of an agreement to the contrary, may maintain ejectment for the mortgaged premises, after breach of the conditions, and so, it seems, may also a trustee in a deed of trust. *Siemens v. Schrader*, 20.
2. EJECTMENT: CESTUI QUE TRUST. The *cestui que trust* in a deed of trust to secure the payment of a debt, cannot maintain ejectment after condition broken. *Ib.*
3. TRUSTS: EQUITY: DEED. T, a married woman, joined with her husband in a deed of her land to one W—the conveyance being made in the absence of the grantee and without consulting him and without any consideration therefor. It did not appear from the evidence that the land was her separate estate or that the conveyance was made in trust for T, or that she ever informed W that he was to so hold it in trust. W subsequently sold the land, informing his grantee that the latter could safely purchase from him; held, that a court of equity would not regard W's grantee as a trustee for T. *Taylor v. Thompson*, 86.
4. DEED OF TRUST, CONSTRUCTION OF. By the provisions of the deed of trust in this case, given to secure the payment of certificates of indebtedness issued by a bank, the liability of the grantor was only secondary, and the land conveyed could not be resorted to for the payment of the certificates, until all the assets of the bank capable of collection by reasonable diligence were collected and applied on said certificates, and, therefore, held that the trustee could not maintain ejectment for the land to the end that he might apply the rents in discharge of the debts, so long as the requirements of the deed of trust, as to collecting and applying the assets, were not complied with. *Davis v. Bessehl*, 439.
5. TRUSTEE: EJECTMENT. Whether a trustee in a deed of trust in the nature of a mortgage, like a mortgagee, can maintain ejectment not decided. *Ib.*
6. BANK: TRUST FUND: RELATION OF CREDITOR AND DEBTOR. The Mastin Bank of Kansas City received a draft on deposit to the credit of the depositors, and thereupon the latter drew their check on the bank, with the request that it should place the proceeds of the same in the Exchange Bank of Denver, Colorado, to the credit of one E, which the Mastin Bank agreed to do. The Exchange Bank was a correspondent of the Mastin Bank, and the latter bank gave the depositors a memorandum addressed to the Exchange Bank, stating that the account of the latter had been credited with the amount of the check to the use of E. The memorandum was at once sent by the depositors to E, and the Mastin Bank also sent a copy of the same by mail to the Exchange Bank, but before it arrived the Mastin Bank had closed its doors and made an assignment for the benefit of its creditors. The Exchange Bank refused to charge the amount to the Mastin Bank, or to place it to the use of E, or to pay the same to him. Held, the Exchange Bank having so refused to

accept the credit, the fund remained in the Mastin Bank impressed with the trust, and the relation of general creditors was not created between the depositors and the Mastin Bank. *Stoller v. Coates*, 514.

7. TRUST FUND. CONVERSION OF: PREFERRED DEMAND. The general assets of the Mastin Bank having received the benefit of the unlawful conversion, the bank is chargeable with the amount of the converted fund as a preferred demand. *Ib.*
8. TRUST FUND, DIVERSION OF. While it may be impossible to follow a fund into its diverted use, it is always possible to make it a charge upon the estate or assets to the increase or benefit of which it had been appropriated. *Ib.*
9. ESTOPPEL. The allowance, however, in favor of the plaintiffs of their claim as a debt against the general assets of the bank, estops them to claim in equity for the conversion of a trust fund. *Ib.*
10. SHERIFF ACTING AS TRUSTEE IN DEED OF TRUST, LIABILITY OF SURETIES OF. Where parties in a deed of trust provide that in the event the trustee named therein shall refuse to act the then sheriff of the county shall execute the trust, and the trustee refuses to act, and the sheriff sells the land and fails to pay over a portion of the proceeds, his sureties are not liable on his official bond for such failure. But it would be otherwise if the sheriff were appointed in an appropriate proceeding by the circuit court to execute the trust. *The State ex rel. Chase v. Davis*, 585.
11. TRUST DEED: DELEGATION OF POWER OF TRUSTEE. A trustee in a deed of trust cannot delegate the trust or power of sale to a third person, unless expressly authorized to do so by the deed, and a sale made by such delegated agent, when unauthorized by the deed, is void. *The City of St. Louis v. Priest*, 612.

See CORPORATIONS, 2.

VARIANCE.

1. PRACTICE: VARIANCE: FAILURE OF PROOF. The rule that a plaintiff cannot declare upon one cause of action and recover upon a different one prevails under the code, but Revised Statutes, sections 3565 and 3702, recognize a plain distinction between a variance and a total failure of proof. *Leslie v. The Wabash, St. Louis & Pacific Railroad*, 50.
2. VARIANCE. In this case there was no substantial variance between the negligence charged in the petition and the evidence. *Ib.*
3. CRIMINAL PRACTICE: VARIANCE. The wound, on a trial for murder, may be proved by the state to have been made on a part of the body different from that alleged in the indictment. *The State v. Walder*, 402.

4. ——— : ———. Where one is indicted in the common form for grand larceny, an instruction is improper which authorizes a conviction under Revised Statutes, section 1315, if the property was lost and the defendant converted it to his own use with felonious intent. *The State v. Gabriel*, 631.

See SLANDER.

VENDOR AND VENDEE.

1. ——— : DECLARATIONS OF VENDOR AFTER SALE. Declarations of one after he has parted with the ownership and possession of property and not made in the presence of his vendee, are inadmissible in evidence against the latter. *Albert v. Besel*, 150.
2. VENDOR AND VENDEE : WAIVER. Where it is obvious from the statements of the vendor that he will not fulfill his part of the contract, all necessity of tendering the purchase money and demanding a deed are waived. *Mastin v. Grimes*, 478.
3. ——— : CLOUD ON TITLE. Where the delay on the part of the vendee is occasioned by facts which throw a cloud on the title to the land, and which render it suspicious in the minds of reasonable men, and to any considerable extent affect the value of the property, such delay cannot afford the vendor an opportunity to rescind the contract because of the failure of the purchaser to make payment of the purchase money. *Ib.*
4. ——— : FRAUDULENT REPRESENTATIONS. Fraudulent representations by a vendor to the vendee must, in order to set aside the conveyance, be as to a material fact, must be likely to deceive, must have been relied upon, and must have contributed directly to the injury. *Smith v. Dye*, 581.
5. ——— : ———. A statement by the vendor, an attorney, that the allowed claim against a receiver, sold by him to another attorney, would be collected, cannot be made the foundation of an action by the latter, where the former stated all the material facts bearing on the claim sold. *Ib.*

VENUE.

1. PRACTICE : CHANGE OF VENUE. On an application for a change of venue, it appeared that the same was sworn to by a nominal party to the suit ; that the prejudice of the inhabitants was alleged to be against him alone, and also that a number of counter affidavits were filed, but they were not preserved in the record ; *held*, that under these facts the Supreme Court could not say that error was committed in overruling the application. *Buchan v. Broadwell*, 31.
2. CHANGE OF VENUE, WHEN MUST BE GRANTED. An application for a change of venue because of the prejudice of the inhabitants of the

county, if sufficient in form and substance, must be granted. The fact* alleged in it cannot be controverted by the opposing party. *Dowling v. Gerard B. Allen & Co.*, 293.

3. ——— : NOTICE. The court refuses to disturb the judgment in this case because of alleged want of reasonable notice to the opposite party of the application for the change of venue. *Ib.*
4. PRACTICE, CRIMINAL : JURISDICTION : CHANGE OF VENUE. Where the judge of the St. Louis criminal court is disqualified for any of the reasons mentioned in Revised Statutes, section 1877, he is authorized by Revised Statutes, section 1881, to call in the judge of another circuit to try a defendant's application for a change of venue, and the judge of such other circuit becomes thereby possessed of jurisdiction of the cause until its final determination, notwithstanding the withdrawal of the application by his consent, after the cause has been reversed in the Supreme Court. *The State v. Hayes*, 344.
5. ——— : CHANGE OF VENUE. When a change of venue is awarded in a criminal cause the court should order the removal of the body of the defendant to the county to which the venue is changed. R. S., sec. 1867. But a failure to then make the order of removal will not deprive the court of the right to make it afterwards. *The State v. Gleason*, 582.
6. ——— : ———. The statute (R. S., sec. 1856) confers no authority to award a change of venue to another circuit, where the ground of the change is the prejudice of the inhabitants of the county in which the cause is pending. *The State v. Gabriel*, 631.
7. ——— : ———. An order of the court improvidently made in such case, transferring the venue to another circuit, is a nullity. The court can set it aside and transfer the cause to another county in the circuit. *Ib.*

VICE PRINCIPAL.

See MASTER AND SERVANT.

VERDICT.

1. CIVIL PRACTICE : VERDICT. The jury in an action for libel returned into court a verdict, "We find no cause of action," and on their attention being called by the court to its insufficiency, and that it should be in form a finding for the defendant, they declined to make the change. *Held*, that it was the duty of the court to direct the jury to retire to further consider their verdict, and to return one in proper form for plaintiff or defendant. *Cattell v. The Dispatch Publishing Company*, 356.
2. ——— : ———. Where a verdict is imperfect and informal the court may direct the jury to amend it, and may direct them to return to the jury room for that purpose. *Ib.*

3. ——— : ———. It is the duty of the court to see that improper and informal verdicts are not entered on its records. *Ib.*

VOLUNTARY CONVEYANCE.

See FRAUDULENT CONVEYANCE.

VOLUNTEER.

See INSURANCE, 8.

SUBROGATION.

WAIVER.

1. WAIVER. One who voluntarily assumes a risk thereby waives the provisions of a statute made for his protection. *Spiva v. The Osage Coal & Mining Co.*, 68.
2. ———. Waiver is ordinarily a question of intention and a fact to be determined by the triers of fact. *Ehrlich v. The Aetna Life Insurance Co.*, 249.
3. ——— : CONTRACT. An acceptance of a sum of money due, regardless of other stipulations in a contract, will not be regarded as a waiver of such other stipulations. *Ib.*
4. DEBT, PARTIAL ASSIGNMENT OF BY CREDITOR : WAIVER. A creditor cannot, without the debtor's consent, assign a part of a note or other debt ; but the latter may waive his right to object to such partial assignment. *The Fourth National Bank of St. Louis v. Noonan*, 372.
5. CONVEYANCE IN FRAUD OF CREDITORS : SPECIAL DEFENCE, WAIVER OF. The objection, in an action to set aside a deed because made in fraud of creditors, that the defence that the land conveyed was a homestead of the debtor was not specially pleaded, is waived unless made when the evidence was offered. *Ziekel v. Douglass*, 382.
6. ——— : TIME : WAIVER. Time is not generally deemed in equity to be of the essence of the contract for the sale and conveyance of land. And even if by express terms a day of payment be fixed and time is declared to be of the essence of the contract, still that is no bar to the time of payment being postponed or to its being waived altogether. *Mastin v. Grimes*, 478.
7. ——— : ——— : ———. If, after the expiration of the time limited for the performance of the contract, the parties continue to deal together or to treat the contract as still existing, this will amount to a waiver of the element of time. *Ib.*

8. **VENDOR AND VENDEE : WAIVER.** Where it is obvious from the statements of the vendor that he will not fulfill his part of the contract, all necessity of tendering the purchase money and demanding a deed are waived. *Ib.*
9. **DEED : PRESUMPTION : WAIVER.** A clause in a city ordinance, by authority of which a deed to the city for certain wharf premises was made, provided that the deed should be binding on the city as soon as the owners of fifteen hundred feet of the wharf should have executed the deed to the satisfaction of the mayor. *Held*, in ejectment by the city to recover the premises, (1) that in the absence of any evidence to the contrary, it must be presumed that the deed was delivered and signed by the prescribed number of property owners, and (2) that the city having entered upon the performance of the stipulations on its part contained in the deed, waived the stipulation in its favor in the ordinance. *The City of St. Louis v. Wiggins Ferry Co.*, 615.

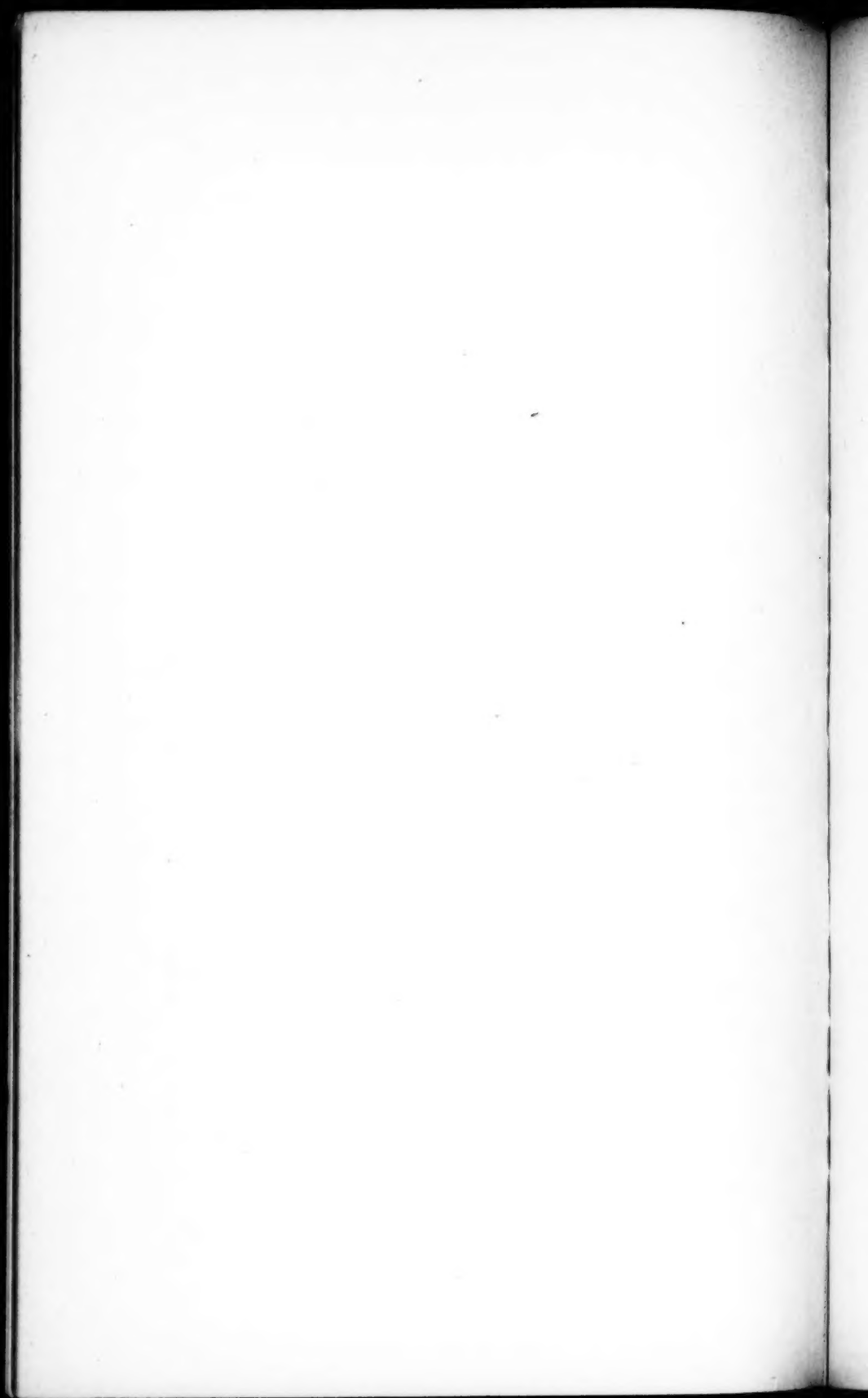
See PRACTICE, CIVIL, 19.

WILL.

1. — : **SALE : WILL.** Where a sale is required to effect a partition of lands under a will, the proceeds will stand in lieu of the land and the amount of the sale, and not the value of the land fixed by the commissioners, will determine the sum to go into the computation for division. *Turpin v. Turpin*, 337.
2. **HOTCHPOT : ADVANCEMENT.** The doctrine of bringing advancements into hotchpot applies only in cases of intestacy, where there is a surplus undisposed of by the will. *Ib.*
3. **WILL, PROBATE OF : RECORD AND JUDICIAL PROCEEDING : ADMISSION OF FOREIGN WILL IN EVIDENCE.** The record of the probate of a will is a record and judicial proceeding within the meaning of the act of congress, and it is not necessary to the admission of a foreign will with the probate thereof in evidence, that they should have been recorded in this state. *Drake v. Curtis*, 644.

WITNESS.

1. **CRIMINAL PRACTICE : DEFENDANT TESTIFYING, CROSS-EXAMINATION OF.** A defendant testifying as a witness on a criminal trial should not be cross-examined by the state as to matters not testified to by him in chief. *The State v. Patterson*, 88.



RULES FOR THE GOVERNMENT
OF THE
Supreme Court of Missouri.

Adopted at the April Term, 1877.

Chief Justice, his duty.

RULE 1. The Chief Justice shall superintend matters of order in the court room.

Motions to be written, signed and filed.

RULE 2. All motions in a cause shall be in writing, signed by counsel and filed of record.

Argument of motions.

RULE 3. No motion shall be argued unless by the direction of the court.

Taking record from clerk's office.

RULE 4. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court.

Diminution of record, suggestion after joinder in error.

RULE 5. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Application for certiorari.

RULE 6. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

Notices of writs of error.

RULE 7. All notices of writs of error, with the ac-

ceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and be by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Reviewing instructions.

RULE 8. In actions at law it shall not be necessary for the purpose of reviewing in the Supreme Court the action of any circuit court or any other court, having, by statute, jurisdiction of civil cases in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance be embodied in the bill of exceptions, but it shall be sufficient for the purpose of such review that the bill of exceptions state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instructions founded on it.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 9. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 10. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions, detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the court that

it does not so tend, which bill of exceptions shall be allowed by the court by which the cause is tried.

Exceptions to admission or exclusion of evidence.

RULE 11. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

Bill of exceptions in equity cases.

RULE 12. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

Rule as to making out transcripts.

RULE 13. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause), in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (e. g.) "summons issued October 2, 1871, executed October 5, 1871," and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

Presumptions in support of bills of exceptions.

RULE 14. The only purpose of a statement, in a bill of exceptions, that it sets out all the evidence in a cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance,

it shall be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Abstracts and briefs to be filed.

RULES 15 and 16 (as consolidated and amended at the April term, 1884). In all cases the appellant or plaintiff in error shall file with the clerk of this court on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of an abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for the respondent or defendant in error, at least *thirty* days before the day on which the cause is docketed for hearing; and the counsel for the respondent or defendant in error shall, at least *ten* days before the day the cause is docketed for hearing, deliver to the counsel for appellant or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall on or before the day next preceding the day on which said cause is docketed for hearing, file with the clerk of this court seven copies of the same, and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the clerk.

Citing authorities in briefs.

RULE 17. In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume and the page where the same will be found; and when

SUPREME COURT RULES.

v

reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, section, paging and side paging shall be set forth.

Appellant's brief to allege errors complained of.

RULE 18. The brief filed on behalf of the appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to errors not thus specified, unless for good cause shown the court shall otherwise direct.

Failure to comply with rules 15 and 16.

RULE 19. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with rules numbered 15 and 16, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or at the option of respondent or defendant in error, continue the cause at the costs of the party in default.

Agreed cases.

RULE 20. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defence and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligibly present to the Supreme Court, or any appellate court, the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in all appellate courts, and the judgment rendered in the court of first instance shall be affirmed or reversed according to the opinion entertained by the Supreme Court respecting the same.

Motion for rehearing.

RULE 21. Motions for a rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute,

or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel ; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel, but no motion for a rehearing shall be filed after the final adjournment of the court.

Motion for affirmance.

RULE 22. On motion for affirmance under section 49, article 13, chapter 110, Wagner's Statutes, the mere fact that the appellant has on file, or presents a copy of the transcript at the time such motion is made, shall not *of itself* be deemed "good cause" within the meaning of said section.

Former rules rescinded.

RULE 23. All rules not included in the foregoing enumeration are hereby rescinded.

ADDITIONAL RULES.

RULE 24. No writ of error from this court to the court of appeals can be issued by the clerk of this court in vacation. All applications in term time for writs of error to the court of appeals, shall be accompanied by an affidavit of the attorney of record that the cause in which such writ of error is sued out, is one of which this court has appellate jurisdiction under section 12, of article 6 of the constitution ; and such affidavit shall state the facts

conferring such jurisdiction, and thereupon the clerk shall issue such writ. (*Adopted at the April term, 1878*).

RULE 25. That hereafter, in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause. (*Adopted at the October term, 1878*).

RULE 26. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given. (*Adopted at the October term, 1879*).

RULE 27. All briefs of counsel shall hereafter contain, separate and apart from the argument or discussion, of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court. (*Adopted at the April Term, 1886*).